PRINCIPLES OF BRITISH CONSTITUTIONAL LAW

PRINCIPLES OF BRITISH CONSTITUTIONAL LAW

BEING A SHORT STUDY OF THE FUNCTIONS AND MUTUAL RELATIONS OF THE EXECUTIVE, THE LEGISLATURE, AND THE JUDICIARY

CECIL S. EMDEN, M.A.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW

AUTHOR OF "THE CIVIL SERVANT IN THE LAW AND THE CONSTITUTION"

METHUEN & CO. LTD.

36 ESSEX STREET W.C.

LONDON

First Published in 1925

PRINTED IN GREAT BRITAIN

PREFATORY NOTE

ALTHOUGH the object of this book is to provide a description, in as concise a form as possible, of what appear to be the most vital features of the present organization of government in Great Britain, there will be found a relatively large number of references to modern statutes and decided cases. The advantages of this method of investigation in a subject like Constitutional Law seem to outweigh the disadvantages, since there is a better chance of escaping misleading and unsupported generalizations. But I have endeavoured, in the interest of the more general reader, to temper the unattractive and, perhaps, forbidding character of legal references by relegating, for instance, the names of cases to footnotes as often as possible.

I am anxious to take this opportunity of expressing my obligations to Professor J. L. Brierly, Mr. A. W. Brown, LL.D., and my brother, Mr. A. B. Emden, for their generous assistance in the nature of advice and criticism, adding the usual observation that mention of their names must not be taken to involve them in any responsibility.

C. S. E.

TABLE OF CONTENTS

CHAPTER IV

Functions of the Legislature

CHAPTER V

Functions of the Judiciary

TABLE OF CONTENTS

CHAPTER VI

Interrelations of Executive and Legislature

CHAPTER VII

The Question of Predominance

CHAPTER VIII

Interrelations of Executive and Judiciary

CHAPTER IX

Interrelations of Legislature and Judiciary

CHAPTER X

CONCLUSIONS

APPENDICES

TABLE OF CASES

A

B

M

N

O

R

TABLE OF STATUTES

PRINCIPLES OF BRITISH CONSTITUTIONAL LAW

CHAPTER I

INTRODUCTORY

Need for Analysis—The capacity of the British Constitution for easy and informal development involves, among other disadvantages, a possible ignorance in governors and governed of important changes in the political centre of gravity and the working of the machinery of government. It cannot be suggested that States with formal constitutions are immune from this risk: evolutionary progress manages to break through or exceed the bounds of formality; but the risk is greater in the former case.

The Crown (meaning the King) was being freely described as supreme at a date when Parliament, high on the wave of the representative idea, had obtained ascendancy, and in some degree ruled. But constitutional development has now proceeded a step further. With an advance in education and a more complete understanding of political science, especially apparent in the general realization and acceptance that all political authority and powers of government are derived from the people, a reaction has followed; and a new type of Executive directs the government of the State. "The modern Englishman . . . desires a strong Executive because his economic and political needs are complex, and because he knows that the Executive must work in harmony with the national will. If, to-day, there is tyranny, it is that of a majority

over a minority."[1] Yet, at the present day, writers are apt to speak, without qualification, of the supremacy of the Legislature; whereas it is only supreme in the sense that it acts, in a representative capacity, as a creator of new Executives, and, at intervals, as a formidable check on the Executive's governmental activities.

It may, perhaps, be fair to say that the Legislature in England originated as a check on an absolute Executive; and, after a period of predominance in government, has become again a check, but on an Executive whose authority is derived from and depends upon the will of the people.

Interrelation of Organs—Governmental authority is exercised in the British Constitution by a machine or body consisting of three main divisions or organs—the Executive, Legislature, and Judiciary. The efficient and balanced action of these organs depends on a satisfactory adjustment of their mutual interrelations. A separate study, then, of the Executive, Legislature, and Judiciary, with the object of observing the extent to which their functions correspond to their structures, the circumstances in which checks or controls between the organs apply, the means of co-ordination and so on, seems likely to be of use; and to be of use in determining how far there exists that which has been described as the balance of the British Constitution.

These interrelations have received some treatment in works on Constitutional Law; but the treatment is incidental, and hardly enables a convenient and concentrated view to be taken of them. A standard work, like Sir William Anson's "Law and Custom of the Constitution," describes the functions, and sometimes the interrelations, of parts of each of the three organs of government. There is, for instance, a short section on the relation of the Crown to the Courts; and there is a chapter dealing historically with the conflict between the Executive and the Legislature. But, in a work, comprehensive yet concise in character,

[1] C. Grant Robertson, "England Under the Hanoverians," 6th ed., p. 182.

comprising as it does an individual account of the activities of every important part of the machinery of government, a study of the interrelations of the main organs of the Constitution is not intended to be a main feature.

Again, Professor Dicey, in his "Introduction to the Study of the Constitution," selects, as he remarks in the Preface to his first edition, certain "guiding principles which pervade the modern constitution of England"—the unlimited and paramount legislative authority of Parliament, the subjection of all the people to the same ascertained regular law, and the division of the subject-matter of Constitutional Law into laws which are enforced in the Courts and conventions which are enforced by other sanctions. Professor Dicey, in the same work, emphasizes the largeness of the uninvestigated fields of Constitutional Law.

Method of Investigation—In the conspectus, then, of the functions and interrelations of the Executive, Legislature, and Judiciary attempted in this book, remarks on the relations of the governors and the governed will be occasional and incidental. Reference to the interaction of parts of an organ will generally be excluded. Moreover, since this is an essay in Constitutional Law, in facts as they exist to-day, and, since there is a danger of "looking too exclusively at the steps by which the Constitution has been developed," [1] only so much historical matter will be included as seems necessary by way of explanation. Speculation, as being the province of the political philosopher, and encroachment on the preserve of the political scientist will be avoided, as far as possible.

In the first place it is proposed to remark on the differentiation of the functions, and the content of each organ; and, after a sketch of the history of the separation of the organs from one composite organ, to set standards so as to enable distinctions to be drawn between functions which conform to the nature of the organs exercising them and those which do not (Chapter II).

[1] Dicey, "Law of the Constitution," 8th ed., p. viii.

Next, there will be examined, in turn, the functions of the three organs, drawing the distinctions which have just been mentioned, and suggesting the reasons for the failure to conform in each case (Chapters III, IV, and V).

It will then be possible to consider the interrelations of the organs, the Executive and the Legislature (Chapter VI), the Executive and the Judiciary (Chapter VIII), and the Legislature and the Judiciary (Chapter IX). But the first of these three will require a supplementary chapter, by way of parenthesis, for a discussion of the question of predominance as between the Executive and the Legislature, a question which was touched upon at the opening of the present chapter (see Chapter VII). The chapters dealing with the interrelations of the organs will be largely concerned with mutual controls or checks, means of co-ordination or collaboration, and the necessity in special cases for independence of action.

In a final chapter, attempt will be made to consider the functions, as exercised by the organs at the present time, in the light of principles to be derived from the doctrine of "the separation of powers," and to summarize the effect of the interrelations (Chapter X).

CHAPTER II

FUNCTIONS AND ORGANS

Differentiation of Functions—The differentiation of the functions of government into executive, legislative, and judicial has become apparent in all States which have passed beyond an elementary stage of political development, from the earliest times of which history tells. And, as a result of this differentiation, the governing body has been separated into organs corresponding to these functions.

The terms "organ" and "function" have a dangerously physiological connotation; but they are convenient; and their use in this context has the approval of such masters as Sidgwick. They, at least, have the advantage over terms like "power," a term which is often used indiscriminately by political scientists, as well as lawyers, to mean either the organ or the function.[1]

In the rudimentary State there may be a stage when the conduct of war is the only function of government, to which is soon added that of the administration of justice; and it may be at a considerably later stage that the function of legislation is evolved. In early England the only "law" was custom, something, that is to say, which was discovered, not made, though the process of invention, in its usual as well as its original meaning, may not have been absent.

The first legislative enactments to be detected in the British Constitution were, perhaps, the instructions to judges: legislation arose out of the exercise of the judicial

[1] Some French jurists use the term "power" in a metaphysical sense, as distinct from organ and function.

function. It has been suggested[1] that the origin in England of the distinction between judging and legislating may be found in the discrimination which was made between original and judicial writs in Chancery, the latter issuing "of course," but the former being constructive in character.

In examining the functions of government as they are exercised to-day, it is possible in the majority of cases to place, without difficulty, a function into one of the three categories; but there are some few instances in which classification is troublesome. For example, an executive department often has the duty, in the administration of a statute, of deciding various matters. It is not always easy to determine whether the decision, affecting the rights and liabilities of subjects is, in its essence, an exercise of the judicial function or an exercise of the executive function.[2] Again, the Executive is frequently empowered by statute to issue formal decrees in order to carry a statute into effect. Sometimes the decree constitutes a rule of conduct and is legislative; at other times it amounts to no more than a statement of fact, and comes within the executive category (e.g. a notice that a certain loan shall be repaid by a stated date). No general rule of division can be advanced.[3]

Content of Organs—The relegation of members of the governing body into organs is hampered to some extent by external unrealities, which are relics of a period when the separation into organs was incomplete, and the organs in the process of separation each exercised functions other than those which conformed to their future structure.

For instance, the final Court of Appeal in respect of proceedings in Great Britain, the House of Lords, remains for historical reasons, nominally part of the Legislature. It does not deliver judgments, but carries a motion, as in the form of legislative business. But essentially the Court is part of the Judiciary. It has come to be recognized as a constitutional rule that only the "Law Lords" shall

[1] Pollard, "Evolution of Parliament," p. 248.
[2] See p. 40. [3] See p. 38.

sit in this Court. The Appellate Jurisdiction Act, 1876,[1] marked the final stage in the development of the Court into a part of the Judiciary and in the practical separation from the Legislature. Section 4 of the Act retained some of the old formalities, now almost meaningless, by providing that "every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament . . ."; but the personnel of the Court was radically changed by the introduction of members of a new kind, Lords of Appeal in Ordinary, salaried and holding office during good behaviour. Moreover, provision was made (by sections 8 and 9) to enable the Court to act during prorogation and even dissolution of Parliament.

Similarly the Judicial Committee of the Privy Council, constituting a final Court of Appeal in Dominion cases and other causes, is nominally part of the Executive. Its judgments are in the form of advice to the Crown, whereupon an Order in Council is issued. But essentially it, too, is part of the Judiciary. As Maitland has remarked,[2] "practically the Committee is a Court of Law."

For the purpose of the present study it will be convenient to consider these two Courts as parts of the Judiciary.

The Executive, then, may be taken as including the members of the Ministry and the members of the administrative departments; the Legislature as including the members of the Houses of Parliament; and the Judiciary as including the judicial officers of all Courts of Justice. At the head of all three is the King.

Courts of Justice must be distinguished on the one hand from other tribunals which act judicially in the sense of deciding questions fairly and impartially, but which are not Courts, for instance, committees of clubs and boards of guardians,[3] and, on the other hand, from Courts in law, with powers of inflicting fines and prescribing imprisonment,

[1] 39 & 40 Vict. c. 59. [2] "Constitutional History," p. 463.
[3] See *Royal Aquarium, etc., Society* v. *Parkinson* [1892], 1 Q.B. 431.

yet who do not act judicially, for instance, a Coroner's Court, whose essential function is investigation, and not the determination of rights and liabilities. A Court of Justice must be both a Court in law and a tribunal acting judicially. Included in this category are the Supreme Court of Judicature, the final Courts of Appeal, other Courts having criminal jurisdiction including Quarter Sessions and Petty Sessions, the County Courts and other local Courts of record.

History of Separation of Organs—In the description of the main functions of each organ which will follow it is desired to differentiate between those functions which correspond to the nature of the organ and those which do not. In other words, there is reason to stress the failure to conform to standard in the exercise of functions by the various organs. And, in order that some explanation of the "disconformities" may be offered, a short review of the history of the separation of the organs of government in England from one composite organ is required. It must be remarked, too, that, even after the separation of the organs was fairly complete, organs were to be found retaining functions other than those corresponding to their nature. They drew apart; but there was a tendency for the Executive, led by the King, to retain all three classes of function, and for the Legislature to retain some of the judicial functions of which it had a share when acting in collaboration with the Curia Regis.[1]

In an early stage of political development in England there was, as in other States, a single body, not separated into organs, which exercised the functions of government. It was substantially the King, with personal assistants, who decided quarrels, declared customs, and led his people in war.[2] These activities are respectively those which

[1] The historical outline in the following paragraphs is largely based on the researches of Professor Holdsworth and Professor Pollard in the "History of English Law," and the "Evolution of Parliament" respectively. The debt is so general that it is not practicable in every case to refer to the pages from which information is drawn.

[2] Cf. Anson, "Law and Custom of the Constitution," vol. i, p. 21.

will later develop into judicial, legislative, and executive functions.

The comprehensive description of the governmental body, by a legal writer of the reign of Edward I—*habet enim rex curiam suam in consilio in parliamentis suis*—indicates a more advanced stage of development; but even at this stage the organs were still unseparated, since, indeed, the functions were not yet properly differentiated.[1] Nevertheless, in the "*curia*" there is a germ of the Judiciary, in the "*consilium*" a germ of the Executive, and in each "*parliamentum*" a germ of the Legislature.[2]

Separation of Judiciary—The separation may be said to have begun in the twelfth century, when the Judiciary first showed signs of breaking away from the governing body. It will be well, therefore, to follow the process of this separation before dealing with the breaking away of the rudimentary legislature.

The despatch by the Curia Regis of judges, as itinerant justices, and the institution of a special bench to try suits between subject and subject (Common Pleas) are the first steps in the separate organization of a Judiciary. But at this stage the Curia Regis acting judicially was held *coram rege*, that is to say, the King's Bench remained attached to the main governmental body.[3]

It was during the following century that the King's Bench began to become dissociated from the King and his Curia; and, perhaps, later, that the judicial side of the financial board of the Exchequer became assimilated to the other two Courts of Common Law. This growth of a separate Judiciary was nourished by the appointment of members of a legal profession to the judicial offices instead of the royal clerks.

A fairly complete separation was effected by the fifteenth and sixteenth centuries; by which time Chancery had become divided from the King's Council.

[1] Cf. examples given in Plunknett, "Interpretation of Statutes in the Fourteenth Century," pp. 23-25.
[2] Cf. Pollard, op. cit., p. 24.
[3] Holdsworth, op. cit., vol. i, pp. 49, 54.

During these periods, however, the Judiciary had remained attached to the Legislature; and, even in the period after the Restoration, the judges assisted the House of Lords in their legislative, as well as their judicial, business, and even occasionally acted as draftsmen of bills or clauses.[1]

Separation of Legislature—The breaking away of the Legislature from the composite governmental body seems to have received impetus from a division, early in the fourteenth century, in the "Council section" of the combined Council in Parliament. The professional officers who had formed part of the "Council section" may be said to have sunk back into the residue of the composite governmental body, which became the separate Executive; and the magnates lay and ecclesiastical (the other part of the "Council section") attached themselves to the elected representatives of boroughs and counties.

In its early history Parliament seems to have been "simply a talk or parley of the Council in full session."[2] Even in 1349 it was said that "the King makes the laws with the assent of the peers and the Commons, and not through the instrumentality of the peers and Commons." But, as the fourteenth century advanced, the effective part in the work of legislation gradually passed from the residue of the composite organ (the Executive) to the Legislature. In the well-known phrase, the Commons claimed to be "as well assenters as petitioners." And by 1414 it was established that legislation should be in a form approved by Parliament.

At the end of the fifteenth century the supremacy of the Legislature within its own sphere was fully recognized; but even at that date it had not gained an exclusive power of enacting laws. The Executive, forcefully headed at

[1] See Ilbert, "Legislative Methods and Forms," p. 78. The only surviving trace of this practice is the reference to two judges for opinion and report in respect of an Estate Bill (i.e. a Private Bill for enlarging the powers of dealing with an estate under a family settlement) in pursuance of Standing Order 153 of the House of Lords. Ilbert, op. cit., p. 79.

[2] Pollard, op. cit., p. 34.

that time by the King, was unwilling to lose the power of issuing proclamations and ordinances, having the effect of legislation, just as it was unwilling to yield up judicial powers which it continued to exercise through the Privy Council. But the Act which abolished the Court of Star Chamber [1] did not deprive the Privy Council of its capacity to act as the final Court of Appeal for the King's lands beyond the seas.

There was a similar retention of judicial functions by the Legislature, though in different circumstances. The main business of the Parliaments of Edward I was to dispense justice; and, as late as the fifteenth century, a large proportion of the work of the Legislature was of a judicial nature. But, for reasons to be discussed later, from the fifteenth century onwards the judicial functions of the Legislature have steadily decreased.

Standards to Assist Consideration of Distribution of Functions—In order to draw a line between functions which conform to the nature of the organs and those which do not, standards must be set; and this must be done as a preliminary to the discussion, in Chapters III, IV, and V, of the functions of the three organs as they are exercised at the present time.

(i) The executive function of the Executive is, for this purpose, defined as the direction of the policy and the administration of the affairs of the State, including the protection of its interests.

The definition here adopted is wide and must be qualified by a condition that the exercise of the function is in a sense residuary, that is to say, the function is limited, in that it must not encroach on (ii) and (iii). A description, however, of the Executive as an "authority which carries the laws into effect so far as they relate to the public services" [2] cannot be accepted as adequate, nor can a statement that "the essential function of the Executive is to conduct the administrative departments of the State," [3] though

[1] 16 Ch. 1, c. 10. [2] Halsbury, "Laws of England," vol. vi, p. 317.
[3] Salmond, "Jurisprudence," p. 129.

this description may be regarded as included within the definition suggested above.

(ii) The legislative function of the Legislature is defined for the present purpose as the formal enactment of rules of conduct which shall be binding on the members of the State, including the amendment and repeal of rules already enacted.[1]

A notable characteristic of this function is that it is exercised to the exclusion of both the other organs. If either of them legislates, it must, subject to an exception affecting overseas Dominions and to relatively unimportant exceptions to be noticed in the following chapter, be under the authority of the Legislature. Salmond [2] defines legislation as "such a declaration of principles as constitutes a legal ground for their recognition as law for the future by the tribunals of the State"; and this definition can be adopted in conjunction with the preceding one.

Since in every democratic State of any consequence the representative organ is also the money-granting organ, there may be added as part of its 'proper' function the regulation of the financial business of the State.

(iii) The judicial function of the Judiciary is for the present purpose defined as the application of the law with a view to the enforcement of its due observance, so as to effect the defence of right and the suppression of wrongs.

It should be pointed out that 'the law' is not co-extensive in England with the "rules of conduct" enacted by the Legislature, but includes the body of Common Law, which has come to be accepted as enforceable.

Emphasis should be laid on the fact that the Legislature's capacity, besides being exclusive, is unlimited—a point which has been elaborated with effect by Professor Dicey. It has even, by the Septennial Act, prolonged its own term. The only limit on its powers is that which is

[1] Cf. Montesquieu, "L'Esprit Des Lois," Book XI, chap. vi, where he states that the Legislature "enacts temporary and perpetual laws, and amends or abrogates those that have been already enacted."

[2] "Jurisprudence," p. 126.

inherent in them, viz. it cannot enact laws which are immutable.

The Legislature's jealousy of encroachment by other bodies is exemplified by a section of a statute of the last century which, although passed to deal with a particular political situation, is still law.[1] It runs thus :—

> "Notwithstanding the repeal of the aforesaid Act [Convention (Ireland) Act] of the Irish Parliament, it shall equally continue and shall be an offence punishable with fine and imprisonment, or with only one of such punishments, at the discretion of the Court before which the offender is convicted, for any person or persons, either as an elector, candidate, or representative, to take part in the election or proceedings of an assembly, other than Parliament as by law constituted, which shall propose to take or shall take upon itself, or wilfully permit to be attributed to it the functions of either House of Parliament, or any of them, or having for its object or tendency to bring Parliament into hatred or contempt."

It is interesting to observe, too, that the new Constitution of the Irish Free State provides (Article 12) that the Legislature shall have the sole and exclusive power of making laws for the peace, order, and good government of the Irish Free State.

The fact that the Legislature has at the present day competitors in the sphere of legislation has been pointed out by Lord Bryce.[2] In this connection he instances meetings of industrial sections, such as the Trades Union Congress, which occupy themselves with public questions and influence large sections of opinion.

[1] Convention (Ireland) Act Repeal Act, 1879 (42 & 43 Vict. c. 28), s. 2.
[2] "Modern Democracies," vol. ii, p. 340.

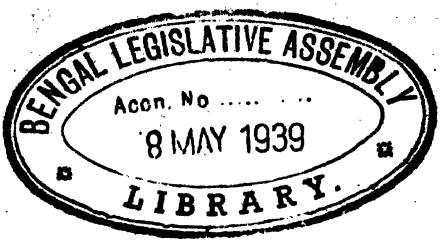
Note on the Division of Organs of Government Otherwise than into Executive, Legislature, and Judiciary

Not all political theorists or constitutional lawyers accept the division of governmental organs into Executive, Legislature, and Judiciary; and the differences in classification do not merely follow from disagreement concerning terminology.

If Locke were living to-day and insisted on describing the Judiciary as Executive because it executed the laws, and on describing the Executive as Federative, because it made "war and peace, leagues and alliances, and all the transactions with all persons and communities without the Commonwealth,"[1] the divergency from the views expressed above would not, perhaps, be vital. But it is contended, for instance, by French jurists, such as Duguit, that, in France, at least, the Judiciary is not an organ comparable to the Executive and the Legislature, which Duguit describes as organs with agents, judicial and administrative. This same view was propounded by Thomas Paine in the "Rights of Man"!

As opposed to Duguit, another French lawyer, Esmein, has stated the reasons in favour of ranking the Judiciary as a distinct organ on the same plane as the Executive and the Legislature. These reasons are given in his "Elements de Droit Constitutionnel Francais et Comparé," 7th ed., vol. i, pp. 509 ff.

[1] "Treatise on Government," chap. xii.



CHAPTER III

THE FUNCTIONS OF THE EXECUTIVE

Executive Functions—The functions exercised by the British Executive which conform to the standard adopted may be divided as follows :—

(i) Conduct of intercourse with other States, and with other parts of the Empire, including the negotiation of treaties ;

(ii) provision for defence against aggression ;

(iii) declaration and conduct of war, and making of peace ;

(iv) summoning and dissolving the Legislature ;

(v) initiation of legislation (concurrently with Legislature) ;

(vi) execution of the laws of the land through the administrative departments (including the appointment to offices in those departments) ;

(vii) maintenance of order and improvement of social and economic conditions ;

(viii) pardon.

In the case of more than one of the above particular functions the exercise is subject to a check by the Legislature or the Judiciary. This position does not prevent the functions being those of the Executive. A discussion of the application of the majority of these checks will follow in Chapters VI and VIII.

External Affairs—With regard to the function under head (i), it is generally deemed advisable by the Executive to obtain the sanction of the Legislature to treaties, concluded in time of peace, which involve important

cessions of territory, the imposition of taxation, a grant from public funds, the amendment of existing laws of trade or navigation, or interference with the private rights of the subject.[1] Where a treaty is made to put an end to war, or, possibly, to prevent war, on public grounds and for the public safety, it is doubtful whether the Executive need obtain the sanction of the Legislature.

The unqualified ability of the Executive to declare war is not an altogether usual attribute of Executives at the present day. There are evidences of a growth of a tendency in other countries, and perhaps even in this country, for the Executive to submit to the Legislature regarding the proposed exercise of the functions mentioned under heads (i) and (iii) above.[2]

In France the head of the Executive (the President) cannot declare war without the previous consent of the two Chambers;[3] the position is similar in the United States of America; and by the new German Constitution of 1919[4] it is provided that war must be declared and peace concluded by national law. Under the Constitution of the Irish Free State (Art. 49), save in the case of actual invasion, the Irish Free State is not to be committed to active participation in any war without the assent of the Legislature, and (Art. 46) the armed forces of the Free State are to be regulated and controlled by the Legislature. The Constitution of Czechoslovakia (of 1920) goes further and requires a three-fifths majority of both Chambers before war can be declared (Art. 33). In Czechoslovakia and Denmark the assent of the Legislature is required for the conclusion of peace; and in the United States of America the concurrence of two-thirds of the Senators voting is necessary, though, in view of recent experience,

[1] Cf. Halsbury, "Laws of England," vol. vi, p. 440, and *Walker* v. *Baird* [1892], A.C. 491.

[2] Even as early as the seventeenth century Hale ("Pleas of the Crown") said that the making of war and peace "though lodged singly in the King ever succeeds best when done by parliamentary advice."

[3] French Constitutional Law on the Relation of the Public Powers (of 1875), Art. 9.

[4] Chap. i, sect. iii, art. 45.

it seems that the concurrence of both Houses of Congress may become the rule.

The provisions of the Constitutions of foreign countries are also interesting in regard to the treaty-making function. They go some way towards putting the position beyond doubt.

The French Constitutional law on the Relations of the Public Powers provides (in Art. 8) as follows:—

"The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the Chambers as soon as the interests and safety of the State permit.

"Treaties of peace and commerce, treaties which involve the finances of the State, those relating to the person and property of French citizens in foreign countries shall be ratified only after having been approved by the two Chambers.

"No cession, exchange, or annexation of territory shall take place except by virtue of a law."

This provision has, in fact, been narrowly construed by the Executive in France. Many important treaties are concluded without reference to the Legislature.

The Constitution of the German Commonwealth (of 1919) contains[1] the provision: "Alliances and treaties with foreign States, relating to subjects within the jurisdiction of the Commonwealth, require the consent of the National Assembly."

Treaties are in all cases made by the Executive; but in every important country in the world, with the exception of Japan, the approval of the Legislature or one Chamber of it is required where treaties are of certain more or less defined classes. Many Constitutions require the assent of the Legislature where treaties involve a burden on the finances of the State, changes in State territory, changes in the legal rights of subjects or where treaties are commercial. This statement may be said to apply to Austria, Czechoslovakia, Denmark, Italy, and Belgium. In the

[1] Chap. i, sect. iii, art. 45.

Netherlands all treaties require the Legislature's assent, unless special legislative provision is made to the contrary; while in the United States of America all treaties must have the concurrence of a two-thirds majority of the Senate voting in the matter.[1]

Doubts in respect of the Executive's functions under head (iv) above, when it is in a minority in the Legislature, are mentioned later (page 84).

Initiation of Legislation—With regard to head (v), initiation of legislation, it is true that a hundred years ago, before an Executive deriving its authority from the people had so fully developed, the initiation of legislation was almost exclusively a matter for the Legislature. De Lolme in his book on the Constitution of England as it was about 1770 was substantially correct in pointing to the acquisition by the Legislature of the initiative in legislation to the exclusion of the Executive as an outstanding feature at that time.[2] There has come to be, however, a well-recognized distinction between Government Bills and Private Members' Bills; and nearly all measures of prime importance are now initiated by the Executive, partly because of the influence which it has over the procedure of the Legislature,[3] but chiefly because no private

[1] The existence of Committees or Commissions of Legislatures, to deal specially with foreign affairs, is mentioned later (p. 90).

[2] Book II, chap. iv.

[3] By Standing Order No. 4 (Public Business) of the House of Commons it is provided that, unless the House otherwise direct:—

(*a*) Government business shall have precedence at every sitting except after a quarter past eight on Tuesday and Wednesday, and the sitting on Friday;

(*b*) After a quarter past eight on Tuesday and Wednesday, notices of motion and public bills, other than Government bills, shall have precedence of Government business; and any Government business then under consideration shall, without question put, be postponed until the business having precedence of it is disposed of;

(*c*) After Easter, Government business shall have precedence during the whole of Tuesday;

(*d*) After Whitsuntide, until Michaelmas, Government business shall have precedence at all sittings except the sittings on the third and fourth Fridays after Whit Sunday;

(*e*) After a quarter past eight, when Government business has not

member can be expected to be sufficiently acquainted with the administrative, technical, and financial difficulties to be compassed by administrative departments in carrying out, e.g., measures of social amelioration. The primacy of the Executive in the initiation of legislation is accentuated by other factors, among which may be mentioned the recent increase in the area of law covered by international conventions. The Executive, being responsible for the State's part in the making of a convention, must naturally be responsible for introducing the municipal legislation necessary to carry it into effect. An example of this class of legislation is the Employment of Women, Young Persons and Children Act, 1920,[1] which was passed to carry out conventions adopted by the International Labour Organization of the League of Nations. The Executive has, moreover, a notable advantage over the private member in that it has the benefit of the services of Parliamentary Counsel, who are specialists in putting proposed legislation into proper form. In spite of their name these officers are not officers of the Legislature, but officers of the Executive, and appointed by the latter. Their services are only available to private members under express instructions from the Executive. Their regular use dates from 1869, a date which follows fairly closely on the time when the production of a legislative programme became a necessary part of the activities of the Executive.

That the main burden, or privilege, of initiating legislation is with the Executive is found to be recognized by the Legislature itself in the terms of its enactments. For instance, section 75 of the Supreme Court of Judicature Act, 1873,[2] makes provision for the consideration of the operation of the Act, of the Rules of Court, and similar matters by a

precedence, notices of motion shall have precedence of the orders of the day.

(*f*) At the sittings on Monday, Tuesday, Wednesday, and Thursday the House will first proceed with petitions, motions for unopposed returns, and leave of absence to members, giving notice of motions, and unopposed private business.

[1] 10 & 11 Geo. 5, c. 65. [2] 36 & 37 Vict. c. 66.

council of the Judges of the Supreme Court. The council is to examine into any defects in the system of procedure or the administration of the law, and, if it decides that any amendments requiring Parliamentary authority are expedient, it is to report accordingly, not to Parliament, but to one of the Principal Secretaries of State.

A useful comparison may again be made to the written Constitutions of continental countries, where the distinction between laws initiated by the Executive and those initiated by the Legislature is recognized. The French Constitutional Law (of 1875) on the Organization of Public Powers, Article 3, provides: "The President of the Republic shall have the initiative of laws, concurrently with the members of the two Chambers . . ."; and the Constitution of the German Commonwealth (of 1919), Chapter I, Section V, Article 68, provides: "Bills are introduced by the national Cabinet or by members of the National Assembly."

In the case of the adoption of the system of a Parliamentary Executive, as in the British Constitution, the influence of the Executive on legislation is not conditioned in the way that it is in the United States, where there is a non-parliamentary Executive, on the party situation in the Legislature. In England the Executive either commands a majority and so is able to effect the carriage of Government Bills, or it does not command a majority and is replaced in its political offices by fresh personnel. It follows that in this country the system of veto is unsuitable and no longer prevails, whereas in the United States the Executive's (the President's) right of veto is freely used, although it can be over-ridden by the Legislature repassing the vetoed bill with a two-thirds majority in each House.

Execution of Laws—Head (vi) (at the opening of this chapter)—the function of execution of the laws, etc.—calls for notice here in connection with terminology. If the execution of the laws were the sole function of the Executive, the term would not be open to objection; but it is not; and consequently it is desirable to draw attention to the misleading character of the term.

Sidgwick, in his "Elements of Politics,"[1] says: "I admit . . . that the term 'executive' is not quite appropriate to denote the power and function exercised by the organ of government that deals in the name of the community with foreign states." And Bluntschli[2] remarks that the expression "executive power is unfortunate, and is the source of numerous errors, misunderstandings in theory and mistakes in practice. It neither expresses the essential character of government, nor its relation to legislation and the judicial power." He proceeds to the contention that the Executive's functions are primary, and that it acts freely within the limits of the law and is not under mandate to act in a particular way. This contention is akin to that advanced above, that a function is properly that of the Executive, although it may be subject in its exercise to checks by other organs.

If it were necessary to suggest an alternative to the term 'Executive,' it would seem desirable to choose a word which would connote, not only the conduct of the affairs of the State, but also conduct in the service of the people and on authority derived from them. The most satisfactory word seems to be 'Administrative.' But the terms "executive" and "administrative" have been used indiscriminately in connection with the British political system. For instance, in the Civil Service the administrative officer is one who acts with discretion while the executive officer is one who is merely employed on routine duties.

Pardon — Of the Executive's functions enumerated at the opening of this chapter, there remains for notice (viii)—pardon. Its inclusion among the 'proper' functions of the Executive is perhaps open to criticism on the ground that it is quasi-judicial in character. The reason for its long-standing exercise by the Executive may be found, in part, by reference to the periods when the Executive and Judiciary were not separated as two organs, and when, later, the Executive mistrusted the attitude of the Judiciary.

[1] P. 353. [2] "Theory of the State" (transl. Oxford, 1885), p. 490.

The function of pardon is usually exercised after conviction, and, thus exercised, does not appear to be so great an interference with the course of justice as a grant of pardon before conviction, which is legally possible. It should be observed, however, that "the right of pardon is confined to offences of a public nature, where the Crown is prosecutor and has some vested interest either in fact or by implication. When any right or benefit is vested in a subject by statute or otherwise, the Crown cannot by pardon affect it or take it away." [1] Thus the Executive in exercising this function is acting in the interest of the public at large and is not interfering with the rights of individual citizens.

There is a tendency noticeable for the Legislature to transfer some part of this function to the Judiciary, which may be exemplified by the provisions of section 19 of the Criminal Appeal Act, 1907,[2] which may usefully be quoted in full:—

"Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State, on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person or indictment or to the sentence (other than a sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

"(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

"(*b*) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly."

But in the absence of statutory authority the Judiciary

[1] Halsbury, "Laws of England," vol. vi, p. 404.
[2] 7 Ed. 7, c. 23.

is careful to abstain from interfering in matters connected with pardon. In litigation [1] before the Judicial Committee of the Privy Council, where there was a petition for leave to appeal from a conviction and sentence of death, Viscount Haldane, L.C., remarked a few years ago: [2] "With regard to staying execution of the sentence of death, their Lordships are unable to interfere. . . . The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside their Lordships' province."

It is convenient at this point to observe that the Executive cannot bind itself by contract to fetter its freedom of action in the future in cases where the welfare of the State might be endangered. For instance, the law imports in the public interest a general provision in all contracts between the Executive and its servants that they may be dismissed at pleasure; and this even though there are terms in a written contract inconsistent with the general provision.[3] In a recent case this same principle, that it is not competent for the Executive "to fetter its future executive action," was explained.[4] It happened that during the war certain neutral shipowners had obtained an undertaking from the British Government upon consideration that if they sent a particular ship to this country she would be given clearance. The British Government, however, found reason to change its mind, and refused to give clearance. On a claim based on breach of contract being advanced, it was decided that the Government's undertaking was not enforceable.

The functions of the Executive in regard to national finance are discussed in the chapter which deals with the interrelations of the Executive and Legislature.[5]

Legislative Functions—The nature of the functions of the Executive which may be regarded as conformable to

[1] *Balmukand* v. *R.* [1915], A.C. 629. [2] At p. 630.
[3] *Dunn* v. *R.* [1896], 1 Q.B. 116, and *Denning* v. *Secretary of State for India* (1920), 37 T.L.R. 139.
[4] *Rederiaktiebolaget Amphitrite* v. *R.* [1921], 3 K.B. 500.
[5] Pp. 93 ff. below.

standard, that is to say, which agree with the character of the Executive organ, have now been mentioned. But it is equally important to remark upon the functions of the Executive which do not conform to standard.

Primary Legislation: For Overseas Dominions—It was observed in Chapter II that, after the process of separation of organs was well afoot, the Executive retained some of the functions which might be expected to have been carried with them by the other two organs; and, as an example of this, the retention by the Privy Council of powers of legislation in respect of British possessions overseas was cited. These powers are still retained and are exercised independently of the Legislature.

The Executive can at the present day (I) legislate by Orders in Council and Letters Patent, so as to affect in varying degrees the Constitutions of Overseas Dominions, (II) legislate by Orders in Council and Proclamations, so as to regulate the currency of Overseas Dominions, and (III) legislate by Orders in Council regarding appeals to His Majesty in Council from Overseas Dominions and Protectorates.

The nature of this class of legislation is best appreciated by concrete examples, which may be taken from the Appendices of Prerogative Orders in the volumes of Statutory Rules and Orders for 1920 and 1921.

EXAMPLES OF (I)

Letters Patent, dated 15th December, 1920, passed under the Great Seal of the United Kingdom, providing that, in the absence of the Governor-General and Commander-in-Chief of Australia from the Commonwealth, the Lieutenant-Governor shall act in his place.

Letters Patent, dated 14th February, 1920, passed under the Great Seal of the United Kingdom, constituting the office of Governor and Commander-in-Chief of the Colony of British Guiana, and conferring certain powers upon him.

Order in Council of 13th August, 1920, constituting a

new Legislative Council for Ceylon, conferring powers upon it and providing for the method of election of its members, its procedure, etc.

Order in Council of 11th June, 1920, providing for the annexation of Kenya Colony to His Majesty's Dominions.

EXAMPLES OF (II)

Order in Council of 13th August, 1920, providing that the sovereign shall cease to be legal tender in Ceylon.

Proclamation, dated 17th May, 1920, declaring nickel tokens to be legal tender in Mauritius.

EXAMPLES OF (III)

Order in Council of 14th July, 1921, prescribing the arrangements in the case of appeals to His Majesty in Council from His Majesty's Court of Appeal for East Africa (which had been set up by an Order in Council of even date).

Order in Council of 9th March, 1921, making rules and regulations in respect of appeals from the Court of Appeal of the State of Johore to His Majesty in Council, His Highness the Sultan of Johore in Council having provided that appeal might so be made subject to rules and regulations prescribed by Order of His Majesty in Council.

Though rarely exercised, the Executive retains the function of issuing general legislation by Order in Council for settled, conquered, and ceded territories before representative government has been granted, and where unrestricted by treaty and the like. This legislation must not be contrary to the fundamental principles of the British Constitution or in opposition to the authority of the British Legislature. But the usual course, in the case of territories without representative legislatures, is for the right of legislation to be vested by the British Executive in the Governor, the reservation of the former's prerogative right being either expressed or implied.

Other Instances of Primary Legislation—The Executive, through the agency of the Privy Council, can, in addition to its powers of legislation in respect of Dominions overseas, issue legislative regulations by Order in Council for the government of the Army and Navy ("King's Regulations"), for the government of the Civil Service;[1] and it is probably still possible for the Executive to regulate trade and commerce in time of war by Order in Council, and to make proclamations in time of war prohibiting persons from leaving the realm—all these without reference to the Legislature.

Secondary Legislation—Another function of the Executive which does not conform to standard is also legislative; but, unlike that just noticed, it is exercised subject to the authority of the Legislature. It is described as delegated, secondary or subordinate legislation; and it becomes necessary in two sets of circumstances. First, because emergencies occur in the life of all States; and, since the Legislature is not in permanent Session and is not, even if it is in session, by its size and structure fitted to deal effectively with a sudden situation, the Executive has delegated to it powers of issuing the necessary decrees. And secondly, because, in a highly developed and thickly populated State of any magnitude, the task of government becomes specialized and complicated to an extent which disables any Legislature from exercising the whole of the legislative function. Difficulties of this nature were even experienced in ancient Athens. When a certain degree of specialization had been reached, a double exercise of functions followed.

Emphasis must be laid on the facts (i) that the Executive must strictly observe the limits of its authorization; and, if it exceeds them, it is liable to be checked through the Judiciary (see Chapter VIII, below), and (ii) that there is no general authorization to the Executive to issue

[1] Civil Service regulations are now issued by the Treasury under standing authority, given by Order in Council of 22nd July, 1920.

ordinances to carry out the purposes of statutes. If the Executive is to be able to issue ordinances for the execution of a statute, the statute must contain express provision to that effect. In this latter respect there is a contrast with the constitutional position in some foreign countries. In France, for instance, although the Executive is sometimes expressly given power to issue regulations to execute statutes, it has a general power in respect of a large class of legislation to issue decrees to fill in the gaps which are left in statutes drawn in general terms. The position appears to be somewhat similar under the German Constitution (of 1919) which provides (Chap. I, Sect. V, Art. 77) that "the National Cabinet issues the general administrative regulations necessary for the execution of the national laws so far as the laws do not otherwise provide. . . ." But other Constitutions, like the Serbian (of 1921) (Art. 94), make provision that there must be a distinct "legal authorization" in each case.

Secondary Legislation in Emergencies—Some system of delegation in case of emergency is a necessity which has been generally appreciated. As an example of comparative interest an article of the Japanese Constitution may serve (Chap. I, Art. 8): "The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial ordinances in the place of laws. Such Imperial ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said ordinances the Government shall declare them to be invalid for the future."

In England there was an "early and isolated phase," in the reign of Henry VIII, in which authority was given to the Executive to deal by delegated legislation with urgent situations. This phase is largely attributable to the political machinations of the Sovereign of that time, and does not bear appreciably on the position to-day. There may, therefore, simply be noted the statute of 31 Hen. 8, c. 8, which empowered the King to issue proclamations to be obeyed

as if made by Act of Parliament, this power being expressed to provide a means of dealing with emergencies.

The chief instances of similar legislation during the immediately succeeding centuries were connected with emergencies due to threats of disease. By the statute of 9 Anne, c. 2, authority was given to the Executive to issue regulations in view of the prevalent plague, so as to enforce quarantine " in a more expeditious manner than at present can be in the ordinary methods of the law." A later example is the delegation under the Contagious Diseases of Animals Act, 1848.[1]

In the war of 1914-18 it became necessary in Great Britain to pass statutes giving the Executive special powers of issuing delegated legislation, so as to protect national interests; and it was felt after the conclusion of the war that there should be permanent statutory authority for the Executive to issue ordinances in the event of urgent situations of other kinds. There was accordingly passed the Emergency Powers Act, 1920.[2]

This Act provides (section 1 (1)) for the issue of a proclamation of emergency, if it appears " that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life."

In the case of the issue of a proclamation of emergency, provision is made for the early meeting of Parliament, if it is not sitting at the time (section 1 (2)), and for the making of regulations by Order in Council (section 2 (1)) " for securing the essentials of life to the community." These regulations may confer or impose on a Government Department such powers and duties as may be deemed " necessary for the preservation of the peace, for securing

[1] 11 & 12 Vict. c. 105, ss. 105, 107. These examples are taken from Carr, " Delegated Legislation," pp. 22-26.

[2] 10 & 11 Geo. 5, c. 55.

and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community."

The considerable extent of the powers of a legislative nature conferred on the Executive by this Act are sufficiently obvious from its terms; and special attention need only be drawn to the capacity of the Executive to alter the criminal law for seven days without any check by Parliament, and to the possibility of these alterations being continued in force thereafter merely on the authority of Resolutions of the two Houses.

Secondary Legislation in Other Cases—Prior to the latter part of the nineteenth century the delegation to the Executive of powers of issuing legislation was rare. All the detailed provisions in respect of factory and workshop legislation were in the early nineteenth century included in the statutes themselves.[1] Early symptoms of the new practice may be found in the Act of 6 Anne, c. 11, art. 1 (Union of England and Scotland), in which power was conferred on Her Majesty to appoint ensigns armorial of the United Kingdom.[2]

Early delegation of legislative power to Government Departments may be instanced by the Act of 57 Geo. 3, c. 41, s. 2, by which the Secretary at War was enabled to make regulations concerning duties formerly performed by the Agent-General for Volunteers and Local Militia, and by the Act of 59 Geo. 3, c. 38, ss. 1 and 3, by which power was conferred on the Executive to make regulations by Order in Council for carrying into effect the Convention with the United States concerning Newfoundland Fisheries.

Analysis of Nature of Powers of Issuing Secondary Legislation (other than in Emergency)—The variations in

[1] Carr, op. cit., p. 49; and see 60 Geo. 3, c. 5.

[2] Cf. later provisions of a similar character in 39 & 40 Geo. 3, c. 67, art. 1 (Union of Great Britain and Ireland), and 56 Geo. 3, c. 104, s. 8, which conferred power on His Majesty by Order in Council or proclamation to appoint the description of ensigns, etc., to be worn by vessels in the preventive service.

the nature of the delegation to the Executive of power of issuing subordinate legislation are best described by a classification of the powers as follows :—[1]

(A) Power to issue regulations, etc., supplementary to the outline provisions of a statute, so as to clothe, as it were, the skeleton with a body, and make it a working instrument—*Supplementary Legislation.*

(B) Power to determine the manner in which a statute is to be applied, either as to dates or as to areas—*Application of Statutes.*

(C) Power to adapt the provisions of earlier statutes which require amendment as a result of the measures of the enabling statute—*Adaptation of Previous Statutes.*

(D) Power to vary or amend the provisions of the enabling statute—*Amendment of Statutes.*

(A) **Supplementary Legislation**—Instances of this type of delegation are so numerous that it is difficult to select representative examples. Two examples are taken from those chosen by Mr. Carr in his book on "Delegated Legislation," the Seeds Act, 1920,[2] and the Roads Act, 1920.[3] They are admittedly cases where more than the ordinary amount of discretion is allowed to the Executive in working out the principles outlined by the Legislature.

By section 7 (1) of the former Act it is left to the Executive to "make regulations generally for the purpose of carrying this Act into effect and, without prejudice to the generality of the foregoing provisions, for prescribing—

"(*a*) The seeds, whether agricultural, vegetable, or forest-tree, to which the Act is to apply.

"(*b*) The manner in which samples are to be taken and dealt with.

"(*c*) Any matter which under this Act is to be prescribed." The Legislature, in a case such as this, leaves to the Executive, not merely the creation of the machinery for carrying out the provisions of the Act, but also con-

[1] In this respect much assistance has been gained from Carr, op. cit., especially pp. 8 ff.

[2] 10 & 11 Geo. 5, c. 54. [3] *Ibid.*, c. 72.

siderable discretion in respect of the extent of its application.

The Roads Act, 1920, is a similar example. It provides, *inter alia*, for the collection and application of excise duties on mechanically propelled vehicles and carriages, for the establishment of a Road Fund, to be subject to the management of the Minister of Transport, for the registration by local authorities of licensed vehicles and for the control of hackney carriages. The Minister of Transport is, by section 12 (1), given power to make regulations "generally for the purpose of carrying this Act into effect, and in particular, without prejudice to the generality of the foregoing provision," to make regulations in respect of such matters as the registration of vehicles, and the character and fixture of identification marks.

There are certain peculiar instances of delegated legislation, closely akin to supplementary legislation, which occur as a result of the increase in the area of law covered by international conventions. The Executive is on occasion empowered by the Legislature to issue Orders in Council carrying the subject-matter of these conventions into effect, so far as municipal law extends. As one example there may be taken the provisions of section 29 of the Copyright Act, 1911,[1] under which Orders in Council can be issued applying Part I of the Act to works first published in foreign countries or of which the authors were at the time of the making of a work subjects or citizens of a foreign country. This method of application was not confined to countries with which Great Britain had entered into a convention with regard to copyright; but it was primarily intended for those countries; and in other cases special formalities are necessary. A somewhat different procedure was adopted in a second example, namely, in the case of the Air Navigation Act, 1920,[2] which, after reciting that a convention had been made determining uniform rules with respect to air navigation, proceeded to empower the Executive by Order

[1] 1 & 2 Geo. 5, c. 46. [2] 10 & 11 Geo. 5, c. 80.

in Council to carry out the Convention and to give effect to it. This constituted a very definite advance in the degree of delegation in cases of this kind.

It is convenient here to specify certain advantages which follow from the delegation to the Executive of power to supplement the Legislature's skeleton enactments. In the first place, the Departments of the Executive have in many cases a specialized knowledge of the subject-matter of the legislation and of the manner in which it will be possible for it to be administered. Then there are occasions when it is desired to place an enactment on the statute-book at short notice, so that a principle may be assured, or for some analogous reason; perhaps the machinery for the administration of the Act can be more efficiently devised after the passage of the Act. Again, the process of delegation allows of the comparatively informal amendment of less important provisions. And, finally, the delegation of supplementary legislation to the Executive relieves the Legislature of detailed work, for which it has not the time.

(B) **Application of Statutes—**

(i) As to date.

There are numerous cases in which the Executive has been empowered by statutes to issue orders appointing a day on which these statutes shall come into force, or to suspend the operation of a statute or part of a statute in certain circumstances, e.g. under section 1 (7) of the Importation of Animals Act, 1922.[1]

(ii) As to area.

The delimitation of the area to be covered by the provisions of a statute is occasionally left to the Executive, for instance, under the Isle of Man (War Legislation) Act, 1914,[2] the Executive was enabled to extend, by Order in Council, the application of any Act passed in connection with the Great War to the Isle of Man, subject to such adaptations as were necessary to the case.

[1] 13 Geo. 5, c. 5. [2] 4 & 5 Geo. 5, c. 62.

(C) **Adaptation of Previous Statutes**—The Irish Free State (Consequential Provisions) Act, 1922 (session 2),[1] will serve as an example. Section 6 (1) of this Act empowered the Executive to issue an Order in Council, making any adaptations of any enactments relating to Dominions other than the Irish Free State, which appeared necessary or proper as a consequence of the establishment of the Irish Free State.

(D) **Direct Amendment**—In this class the degree of delegation reaches its highest limit. It is no doubt a realization of the significance of a delegation to the Executive of power to alter the law, which has limited this class to few examples.

By the Coal Mines Act, 1911,[2] section 86 (1) (as amended by the Mining Industry Act, 1920,[3] sections 1 and 2), the Secretary for Mines may by order make such general regulations for the conduct and guidance of the persons acting in the management of mines or employed in or about mines as may appear best calculated to prevent dangerous accidents, and to provide for the safety, health, convenience, and proper discipline of the persons employed in or about mines, and for the care and treatment of animals used therein. Any of these regulations may *vary or amend* any of the provisions contained in the Part of the Act relating to safety provisions, or the Schedule to the Act, comprising regulations concerning care and treatment of horses and other animals in mines.

The Salmon and Freshwater Fisheries Act, 1923,[4] section 38, in one respect goes even further, and permits the modification not only of the enabling Act, but also of other Acts. Orders made by the Minister of Agriculture for the regulation of fisheries may, by that section, define the area of fishery districts, within which the Act is to apply, provide for the constitution and incorporation of fishery boards, and *modify* in relation to the fisheries within areas defined any of the provisions of the Act which relate to the

[1] 13 Geo. 5, c. 2.
[2] 1 & 2 Geo. 5, c. 50.
[3] 10 & 11 Geo. 5, c. 50.
[4] 13 & 14 Geo. 5, c. 16.

regulation of fisheries, or of any local Act relating to any fishery within the defined area. It should, however, be pointed out that the Order must be made on the application of a party interested, and that if (under section 40 (4) of the Act) objection to the Order is raised by parties interested, the Order is provisional only, and, in order to survive, requires to be confirmed by the Legislature by being scheduled to an Act of Parliament passed for the purpose.

Legislation in the full meaning of that term implies the capacity to repeal and amend laws. Provision to this end in respect of subordinate legislation is sometimes made in the enabling Act; and, in respect of rules and regulations, a general provision is made by section 32 (3) of the Interpretation Act, 1889,[1] which, in the absence of intention to the contrary, makes the power to be construed as including the capacity to "rescind, revoke, amend, or vary" the rules and regulations.

It is desirable to reiterate here that some decrees issued by the Executive under the authority of the Legislature are in their essence executive rather than legislative.[2]

Provisional Orders—The delegation to the Executive of the power to prepare legislation by way of Provisional Order is of a different nature to that discussed above, and requires some remarks. This method of legislation commenced to operate about the middle of the last century, and has, since then, been extensively utilized. "The system," as Sir T. Erskine May[3] has explained, ". . . enables Government Departments . . . to deal in detail with many undertakings with which Parliament would otherwise be asked to deal *ab initio* in a private or public Bill. These subjects of provisional legislation are for the most part, but by no means always, of a local character. Under various Acts of Parliament most of the Departments are now empowered to issue Provisional Orders (usually upon the application of parties interested), which in their

[1] 52 & 53 Vict. c. 63. [2] See p. 6.
[3] "Parliamentary Practice," 12th ed., p. 762.

scope and object are practically private bills, or to make Provisional Orders (in many cases on their own initiative) for other purposes. The objects obtainable by Provisional Order are limited to those specified by the particular enabling Act. Such Orders are scheduled to a Bill, which is brought in by the Government Department, and which declares the expediency of their confirmation; and in this form they are submitted to Parliament for consideration." [1]

There are a few cases where confirmation is not required, or is required only in special circumstances. The Order is not, then, or not necessarily, provisional. One instance is supplied by the provisions of the Salmon and Freshwater Fisheries Act, 1923, quoted above. Another instance is the Pilotage Act, 1913,[2] under which the Board of Trade may make Provisional Orders for the delimitation and rearrangement of pilotage districts, for the incorporation, constitution, and procedure of pilotage authorities, and for the discontinuance or continuance of any Act, order, charter, etc., in any pilotage district. An Order made under the Act only requires confirmation by Parliament if it is an Order made for the purposes of Part I of the Act (which relates to the revision of pilotage organization), or if a petition against it is presented to the Board of Trade within a specified time by a person interested in pilotage organization. With regard to matters outside Part I, an Order cannot be made by the Board of Trade except on the application of a party interested.[3] It is seen, therefore, that it is only Orders issued on application which can become law without confirmation by Parliament.

Maintenance of piers and harbours, construction of tramways and docks, and regulation and enclosure of commons are other typical subjects in respect of which, under various Acts, the Executive may deal by Provisional Order.

As an example of the type of Provisional Order which

[1] For specimens of Provisional Orders and Provisional Order Confirmation Acts, see Appendix I, pp. 191 ff.

[2] 2 & 3 Geo. 5, c. 31.

[3] May, op. cit., p. 771.

may be issued without application and which is not of a local character, the Copyright Act, 1911,[1] may be quoted. Section 19 (3) of this Act confers power on the Board of Trade to make Provisional Orders for altering the rate of royalties on records, perforated rolls, and other contrivances by which sounds may be mechanically produced.

A material factor in regard to the Provisional Order system is the inability to make the Order effective before the date of the Act confirming it; and most Provisional Orders state that they shall come into force at the date of their confirmation. This practice appears not to be invariable. The Lanarkshire County Council Order Confirmation Act, 1922,[2] may be taken as an example. This Act was passed on 29th March, *1922*, and confirmed a Provisional Order, expressed to take effect from the date of the confirming Act, *except where otherwise provided*, and containing a provision (clause 26) that, as from 15th May, *1921*, there should be substituted a new section for an existing section of a local Act.[3]

This Provisional Order was issued in pursuance of the Private Legislation Procedure (Scotland) Act, 1899,[4] section 7 (2), which provides that no Order shall be of any validity, unless it has been confirmed by Parliament. The intention may have been to make the provisions retrospective; but the instance is mentioned to stress the proper limits of the Provisional Order system. It should be added that all local legislation in Scotland is effected by means of Provisional Orders under the Act above-mentioned, avoiding the necessity for Private Acts.

When account is taken of the cases where application or confirmation is unnecessary and the fact that confirmation is on occasions to some extent a formality, it will be appreciated that this method of delegating functions, although chiefly local in character, has developed in a

[1] 1 & 2 Geo. 5, c. 46. [2] 12 Geo. 5, c. i.
[3] Cf. also North Berwick Burgh Extension Order Confirmation Act, 1923 (13 & 14 Geo. 5, c. liv).
[4] 62 & 63 Vict. c. 47.

manner which involves a considerable degree of devolution. It seems, moreover, likely that, owing to the cumbrous nature of the present procedure, in England at least, the removal of the necessity for confirmation will become more general, and the Orders will be Orders simply. A symptom of this tendency is found in the Gas Regulation Act, 1920,[1] which by section 10 (1) provides that anything, which under the Gas and Waterworks Facilities Act, 1870,[2] or any Act amending it, may be effected by a Provisional Order confirmed by Parliament, may, so far as these Acts relate to gas, be effected by a special Order, made on the application of any local authority, company, or person, by the Board of Trade.

Form of Secondary Legislation—The form in which the delegated legislation is issued by the Executive is not of so much importance as the substance; but it deserves notice.

The use of any particular one of such vehicles as Proclamations, Orders in Council, Regulations, Rules, Orders, in any particular case is not always easy to explain. The Proclamation is rarely used nowadays except to draw attention to existing laws, to summon and dissolve Parliament, and to declare war and peace. An example of the Proclamation as the form of delegated legislation is provided by the Customs Consolidation Act, 1876,[3] section 43, which enables "the importation of arms, ammunition, gunpowder and any other goods" to be prohibited by Proclamation or Order in Council.[4]

The circumstances giving rise to the issue of regulations to carry out the object of an Act in the guise of an Order in Council are specially interesting, and have been attractively described by Mr. C. T. Carr:[5] ". . . When Parliament began to realize the convenience and even the necessity

[1] 10 & 11 Geo. 5, c. 28.
[2] 33 & 34 Vict. c. 70.
[3] 39 & 40 Vict. c. 36.
[4] See Appendix II, p. 198. This is the section which was considered in the famous pyrogallic acid case, *Attorney-General* v. *Brown* [1920], 1 K.B. 773, where it was decided that "any other goods" must be confined to goods of the same class as arms, etc., and that a Proclamation based on the opposite view was invalid.
[5] "Delegated Legislation," pp. 54, 55.

of delegating legislative power, it was easy to make use of the old machinery and to permit the statutory Order in Council to do what the prerogative Order in Council had been restrained from doing. . . . Until our administrative departments (which in some instances are off-shoots of the Privy Council) reached their present elaboration, the King in Council or the Privy Council was the obvious authority available to undertake to make rules and regulations. The more elaborate our Departments become, the more do they take over the legislative powers entrusted in time past by Parliament to the Privy Council. Yet even now, though the Home Office is specially concerned with aliens and the Air Council with aerial navigation, the big codes governing those topics are issued, not on the authority of the heads of those Departments, but on the authority of an Order in Council. Doubtless the Department prepares the drafts, but the formal legislative Act is made more dignified—one might almost say more national—by being united with the traditions of the King in Council." [1]

Regulations, pure and simple, however, without being clothed with the dignity of the Order in Council, are used as the form in which much subordinate legislation is issued by the Executive.[2]

Rules are chiefly used as the vehicle of subject-matter of a procedural nature.[3]

Orders appear often to be issued in similar circumstances to those in which Regulations are issued,[4] but, in general, this form, or rather term, is used in the case of the promulgation of that which is rather in the nature of an executive decision, and which can only be classed as a legislative measure by a strain on the meaning of legislation.[5]

Recapitulation—It may be well at the conclusion of the consideration of the legislative activities of the Executive to summarize the facts of the position.

[1] For examples, see Appendix II, pp. 199, 200.
[2] *Ibid.*, pp. 200, 201.
[3] *Ibid.*, pp. 202 ff.
[4] *Ibid.*, p. 205.
[5] *Ibid.*, pp. 206, 207.

(*a*) The Executive has retained, as a mediæval heritage, certain legislative powers, which have never been taken over by the Legislature.

(*b*) The Legislature, appreciating its own inherent limitations, has delegated standing authority to the Executive to issue ordinances in emergencies.

(*c*) The Legislature, finding that the business of legislation has become a matter of considerable magnitude, complication, and specialization, has delegated to the Executive by various statutes the power—(i) to issue subordinate legislation so as to carry the objects of those statutes into effect, (ii) to prepare Orders, chiefly of a local character, which, in the absence of congestion of legislative work, would be in the form of Private or Local Acts. These Orders obtain the validity of statutes, because they are included in Schedules to Acts of Parliament specially passed for the purpose.

Judicial Functions—The complex nature of governmental activities is responsible not only for the exercise by the Executive of legislative functions, but also for the exercise by it of judicial functions. The practice of the Legislature to confer judicial powers on executive Departments or officers in matters of a specialized character is due, to some extent, to the difficulty of separating these powers from the work of administration. It is only during the present century that this expedient has been invoked in regard to such subjects as insurance, transport, education, and revenue. "In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial." [1]

The conduct of these appeals by executive officers and also of references to them without previous hearing by

[1] *Per* Haldane, L.C., in *Local Government Board* v. *Arlidge* [1915] A.C. 120, at p. 132.

another tribunal must, in order to be included among judicial functions, involve the making of a decision affecting the rights and liabilities of citizens. The considerable extent of the category 'judicial,' as determined by the courts, in cases where remedy can only be obtained in the case of the act complained of being found to be judicial, may be illustrated by a recent case.[1] In this case the Electricity Commissioners, who act under the immediate supervision of the Executive, formulated a scheme providing for the incorporation of a joint electricity authority, in pursuance, as they thought, of statutory authority. Unfortunately the scheme included some arrangements which rendered it *ultra vires*. Proceedings were instituted to prevent the Commissioners making an Order embodying the scheme; and the remedy claimed (writ of certiorari) was only applicable, if the action of the Commissioners was judicial. One of the judges of the Court of Appeal,[2] after pointing to the necessity of the Commissioners holding local inquiries before formulating a scheme, expressed the opinion that "powers so far reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely . . . as proceedings towards legislation."

Judicial Decisions With and Without Appeal—In some cases the Legislature has conferred on 'executive' tribunals the power of acting judicially, subject to appeal to the High Court; and in other cases the decision of the 'executive' tribunal is final. The Unemployment Insurance Act, 1920,[3] section 10 (1), enacts that if questions of the following classes arise—whether or not a person is an "employed person" within the meaning of the Act—who is the employer of any employed person—the rate of contribution payable in respect of any employed person, the question shall be decided by the Minister of Labour, provided that any person aggrieved by such a decision

[1] *R.* v. *Electricity Commissioners* [1924], 1 K.B. 171.
[2] Bankes, L.J., at p. 198.
[3] 10 & 11 Geo. 5, c. 30.

may appeal to the High Court. The section enables the Minister, if he so desires, to avoid deciding the matter himself and to refer it direct to the High Court. On the other hand, by the Roads Act, 1920,[1] section 14 (3), the Minister of Transport is created a tribunal to decide appeals from decisions of licensing authorities upon applications for licenses to ply for hire with omnibuses; and the decision of the Minister is to be final and not subject to appeal to any Court, and is, on the application of the Minister, to be enforceable by writ of mandamus.

Procedure in Exercise of Judicial Functions—Whether or not the 'executive' tribunal must make its procedure conform to that of a Court of Justice, and whether or not it may decide questions of law depend on the terms of its statutory authorization. The intention of the Legislature must be followed.

In a case[2] in which certain questions concerning the legal liabilities of local education authorities to managers of schools were to be determined by the Board of Education under section 7 of the Education Act, 1902, the Lord Chancellor,[3] after remarking on the innovation of imposing on Departments or officers of the Executive the duty of acting judicially, remarked: "In the present instance, as in many others, what comes for determination is . . . a matter to be settled by discretion involving no law . . . but . . . [in other cases] it will involve matter of law, as well as matter of fact, and even depend upon matter of law alone. In such cases [it will be necessary] to ascertain the law and also to ascertain the facts. I need not add that, in doing either, they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial." He then proceeded to observe that the Board of Education had, under the section in question, no jurisdiction to decide

[1] 10 & 11 Geo. 5, c. 72.
[2] *Board of Education* v. *Rice* [1911], A.C. 179.
[3] Lord Loreburn, at p. 182.

abstract questions of law, but only "to determine actual concrete differences that may arise as between the managers and the local education authority."

Although there may be no appeal from the decision of the Executive Department in cases of this nature, if the Court is satisfied that the Department has not acted "judicially," as described by the Lord Chancellor in the above quoted case, or has not decided the question it is required by the enabling Act to determine, there is remedy by writs of mandamus or certiorari.[1]

In a later case[2] the question of the Legislature's intention in respect of the nature of the procedure to be adopted by the tribunal is particularly well illustrated. The judicial functions in question were those of the Local Government Board regarding the closing of unhealthy houses. The facts, which are stated in substance below, require rather full description.

Under the Housing of the Working Classes Act, 1890, a local authority could apply to a justice of the peace for a closing order, there being the usual right of appeal from the justice of the peace to Quarter Sessions. The proceedings before the justice of the peace or Quarter Sessions were governed, as all their proceedings are governed, by the rules applicable in a Court of Justice.

The Housing Town Planning, etc., Act, 1909, enacted a fresh system in regard to closing orders. The local authority itself could make an order; and an aggrieved owner could appeal to the Local Government Board. The Local Government Board were empowered to make rules settling their procedure under the Act; and the rules were to include a provision that the Board should not dismiss an appeal without having held a public inquiry.

Now, if the Board were bound to act on the analogy of the procedure in a Court of Justice, it was necessary for them, in dealing with the appeal of the owner in the present case, to hear him before deciding the appeal. What, in

[1] See pp. 157 ff.

[2] *Local Government Board* v. *Arlidge* [1915], A.C. 120.

fact, the Board did was to send an inspector to hold a public inquiry before whom the owner's case was argued, and the latter gave evidence. The inspector reported to the Board, who dismissed the appeal.

The House of Lords decided that the arrangements under the Act of 1909 were so completely changed from those of the Act of 1890, viz. in giving the appeal to executive and not to judicial authorities, that the intention of the Legislature must have been that the executive authority should follow its own procedure, subject to the provisions of the Act, and not follow the analogy of the procedure of a Court of Justice. The only qualification stated was that the Board should act in a judicial temper and deal with the question referred to them without bias, giving to each of the parties the opportunity of adequately presenting their cases. "The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice;" [1] and it was decided that this requirement had been satisfied.

The House of Lords showed their appreciation of the difference in the organization of an Executive Department from that of a Court of Justice, and of the resulting reasonableness of the variation in procedure.

Judicial Functions in Case of Provisional Orders—It was noticed, in discussing the legislative functions of the Executive, that Government Departments were frequently empowered to make Provisional Orders. Before the Order is made, it is, under the provisions of many of the enabling Acts, the duty of the Department to hold locally a public inquiry into the merits of a proposed undertaking, at which the applicants and their opponents may be heard. In some cases the inquiry is obligatory on the Department, if it is deemed desirable to proceed with the proposed undertaking. In other cases the inquiry is only held if the Department considers that such a course is necessary. These inquiries involve the Executive in work of a definitely judicial

[1] *Per* Haldane, L.C., at p. 132.

character; and, as a result, there is the strange picture of an executive authority acting in legislative and judicial capacities in respect of the same matter—and that a matter in respect of which it may have executive duties. This is a subject to which it will be necessary to revert later.

Quasi-Judicial Functions—Finally, if the Executive desires that a matter of general public interest should be made the subject of independent quasi-judicial investigation, without the object of deciding upon rights and liabilities, it is open to it to arrange for the appointment of a Royal Commission, or, under the provisions of the Industrial Courts Act, 1919,[1] section 4, the Minister of Labour may, "where any trade dispute exists or is apprehended," either himself formally inquire into the causes and circumstances of the dispute, or he may refer such matters as these to a Court of Inquiry, whose duty it is to investigate and report. The Minister may make rules in respect of the procedure of any Court of Inquiry, including rules for summoning witnesses, who can be required to give evidence on oath. The object of these quasi-judicial inquiries is to bring into focus the issues of a trade dispute, which may affect the public interest, so that a settlement may more easily follow.

[1] 9 & 10 Geo. 5, c. 69.

CHAPTER IV

THE FUNCTIONS OF THE LEGISLATURE

Legislative Functions—In its early stages and before it had attained a separate entity, the Legislature was a deliberative body, whose function it was to discuss the affairs of the realm. This function remains. Discussions of questions of vital national interest are frequently held in Parliament without any immediate legislative action being intended. But the Legislature is nowadays chiefly engaged in legislation proper, that is to say, in the formulation and enactment of rules of conduct to be binding on the members of the State, or their repeal. These rules may confer powers or impose duties on the Executive.

As has already been observed, the Legislature shares the initiation of legislation with the Executive, but the private members' share is a small and, apparently, a diminishing one.

In order that it may be contrasted with provisions of a different character, to be quoted later, a section of a statute strictly conforming to type may be chosen almost at random :—

"A tenant who has remained in his holding during two or more tenancies shall not, on quitting his holding, be deprived of his right to claim compensation under this Act in respect of improvements by reason only that the improvements were not made during the tenancy, on the termination of which he quits the holding." [1]

This example comes within what is known as substantive law ; but the Legislature also enacts laws dealing

[1] Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), sect. 7.

with procedure, and does not leave that sphere to the Judiciary, except within definite limits of delegation. Thus, in the Administration of Justice Act, 1920,[1] section 10, provides:—

"Where a judgment has been obtained in the High Court . . . against any person, the Court shall, on application made by the judgment creditor, and on proof that the judgment debtor is resident in some part of His Majesty's dominions outside the United Kingdom to which this Part of the Act extends, issue to the judgment creditor a certified copy of the judgment."

A further classification of statutes, and one which may affect the Executive, is into mandatory, comprising what is tantamount to an order, and directory, implying merely a general direction which may be acted upon, if and so far as thought proper.

As remarked in Chapter II, it is well established in modern constitutions that the Legislature, or representative organ, is also the organ to authorize the collection and expenditure of public moneys; and the Acts of Parliament which, for instance, provide for the appropriation of funds for definite purposes gives this fiscal control a legislative character. Yet a section in an Appropriation Act, which appropriates so many million pounds to such and such services and purposes, is easily distinguishable in character from the rules of conduct instanced above.

A somewhat similar explanation can be given for the seeming failure of an Act, which runs thus, to comply with standard: "The approval of Parliament is hereby given to the Treaty set out in the Schedule to this Act."[2] The Legislature's approval, where required, is most naturally made known and recorded in the form used in the organ's more normal activities.

Quasi-Executive Functions—The exclusive power of the Legislature to legislate and the absence of any limit

[1] 10 & 11 Geo. 5, c. 81.

[2] Anglo-French Treaty (Defence of France) Act, 1919 (9 & 10 Geo. 5, c. 34).

to that power have been noticed; and there will be noticed the effective position of the representative organ as a "maker" and "breaker" of Executives. But Parliament does not *govern*; and, therefore, statutes, which, apart from qualifications suggested in the preceding paragraphs, deal only with a particular case and do not lay down a general rule, cannot be regarded as being strictly an exercise of the legislative function.

A reason for the passing of statutes of this class two hundred years ago is pointed out by Maitland.[1] He attributes it to Parliament's jealousy of the Crown, and suggests that "to have erected boards of Commissioners empowered to sanction the enclosure of commons or the widening of roads, to have enabled a Secretary of State to naturalize aliens, would have been to increase the influence and patronage of the Crown." An earlier reason would be the exercise by the Legislature of executive as well as legislative functions, owing to the confusion arising from the process of the separation of the main organs of government.[2]

As a casual example of the exercise by the Legislature of executive functions in times past, there may be taken a public statute of 1765,[3] "for cleansing and lighting the streets, lanes, and passages within the towns of Manchester and Salford in the County Palatine of Lancaster; and for providing fire-engines and firemen; and for preventing annoyances within the said towns." There were passed, too, about this period many public Acts for "maintaining, regulating, and employing" the poor within specified parishes, and for repairing and widening roads in specified districts.[4]

Maitland proceeds to describe how, at about the middle

[1] "Constitutional History," pp. 382-4.
[2] See p. 8.
[3] 5 Geo. 3, c. 81.
[4] Between 1760 and 1774 452 Highway Acts were passed. Between 1702 and 1750 there were passed 112, and between 1750 and 1810 there were passed 2921 Enclosure Acts.—C. G. Robertson, "England Under the Hanoverians," 6th ed., pp. 331, 335. No one can read many Hanoverian statutes without being impressed with the mass of administrative detail which they contain.

of the nineteenth century, Parliament "gives up the attempt to govern the country, to say what commons shall be enclosed, what roads shall be widened. . . . It begins to lay down general rules . . . and to entrust their working partly to officials . . . and partly to the Law Courts." There was, too, at the period mentioned a measure of decentralization.

It is not easy at the present day to point to any whole statute as involving an exercise by the Legislature of the executive function. Indeed, so far from there being a retention by the Legislature of executive functions, the tendency, as has been seen, is an opposite one, namely for delegation of legislative functions by the Legislature to the Executive. There are, however, to be found provisions in sections of Acts of Parliament, which cannot be described as furnishing rules of conduct. They are in the nature of executive acts. In the Universities of Oxford and Cambridge Act, 1923,[1] for instance, powers are conferred on Commissioners and others; and the sections conferring those powers conform to standard. But section 1 (1) enacts that "there shall be two bodies of Commissioners"; and sections 2 and 3 proceed to provide that named persons shall be Commissioners. It is, however, clearly convenient that the executive act of appointing the Commissioners should be recorded in connection with the definition of their powers. A more difficult case to assess is the provision of the Summer Time Act, 1922,[2] section 1 (1), which runs: "The time for general purposes in Great Britain shall, during the period of summer time, be one hour in advance of Greenwich mean time."

Local and Private Legislation—The enactment by the Legislature of Local or Private Acts, dealing with local undertakings is in a different category from Public Acts, and has its historical origin in petitions to Parliament, acting in a quasi-judicial character. This class of the Legislature's activities will be mentioned again at the end of the present chapter,

[1] 13 & 14 Geo. 5, c. 33. [2] 12 & 13 Geo. 5, c. 22.

in connection with the quasi-judicial nature of some of the Legislature's functions. It is not always found simple in practice to determine whether a particular Bill should be dealt with as public or private, the criterion being whether the citizens of the State as a whole or only certain citizens or the citizens in a certain locality are affected. The practice of classing Bills concerning the Metropolis as public and those concerning the City of London, generally, as private indicates how close is the distinction.

There has been of recent years a notable decline in Private Bill legislation. This has been attributed by Sir C. Ilbert to (*a*) the expense, (*b*) the ground being covered by general public Acts, like the Public Health Acts, and (*c*) the substitution of Provisional Order machinery.

Personal Acts—There must be mentioned a special class of statutes passed by the Legislature, which do not, strictly speaking, involve the exercise of the legislative function, since no rule of conduct is enacted, namely Personal Acts, e.g. Name Acts and Estate Acts. When, therefore, there are cases in which it is desired to change a name or to obtain additional powers in connection with settled estates and it is difficult, otherwise, to secure effective authority, resort is made to the Legislature, which supplies the authority in the form of a Personal Act of Parliament. The most comprehensive explanation of the practice of passing these Acts is found, perhaps, in the unlimited nature of the Legislature's powers.

Judicial Functions—So far there have been discussed instances of activities of the Legislature of a quasi-executive nature. Next there fall for treatment instances of the exercise by the Legislature of functions which are of a judicial or quasi-judicial character. In this treatment there will be excluded the activities of the House of Lords, acting as a final Court of Appeal, since, as has been suggested above, this Court is in effect separate from the Legislature and is essentially a part of the Judiciary.

The judicial functions of the Legislature may be considered under two main heads: (i) where the interests of

the State are immediately and closely concerned, and (ii) where the jurisdiction is connected with the constitution or proceedings of the Legislature itself.

High Matters of State: (i) (*a*) *Impeachment and Acts of Attainder.*—" Impeachment by the Commons [so that the person impeached might be tried before the Lords] for high crimes and misdemeanors beyond the reach of the law, or which no other authority in the State will prosecute, is a safeguard of public liberty, which happily in modern times is rarely called into activity." [1] With an Executive, depending on the will of the people, and a pure Judiciary, having jurisdiction over members of the Executive, there is little, if any, need for these special measures.

Other countries retain provisions for impeachment in their formal constitutions. There is provision in the French Constitution of 1875, in the Constitution of the German Commonwealth of 1919; and the article on the subject in the Constitution of the United States remains; but it provides that judgments in cases of impeachment shall not extend further than to removal from office of honour, trust, or profit under the United States, the party convicted being, nevertheless, liable to trial and punishment by the ordinary process of law. This involves a recognition, similar to that in this country, that the sphere of the Judiciary should not be trenched upon any further than the interest of the public demands.

The practice of passing bills of attainder and of pains and penalties has, it seems, ceased to exist; and it need simply be noted that, by this procedure, the Commons were judges of equal jurisdiction with the Lords, and not merely accusers and advocates, as in the case of impeachment. The parties who were subjected to these proceedings were permitted to defend themselves by counsel and witnesses before both Houses.

(*b*) *Committees of Inquiry.*—The Legislature have, on many occasions, during the last 250 years, appointed special or select committees to inquire judicially into

[1] May, " Parliamentary Practice," 12th ed., p. 588.

operations of government which appeared to have been mismanaged, for instance, the conduct of the war in Ireland in 1689, and the administration of the Army before Sebastopol in 1855. Difficulties in regard to evidence before analogous committees of inquiry have now been met by a recent statute.[1] If it is resolved by both Houses of Parliament that it is expedient for a tribunal to be established for inquiry into a definite matter described in the Resolution as of urgent public importance, and if in pursuance of the Resolution a tribunal is appointed for the purpose, *either by His Majesty or the Secretary of State*, the instrument of appointment may confer on the tribunal the powers of the High Court concerning attendance, examination of witnesses, and production of documents, together with the right to bring persons before the High Court with a view to their punishment for contempt.

Constitution and Procedure of Legislature: (ii) (*a*) *Trial of Peers and Peerage Claims.*—The House of Lords claims the right to try its own members, if charged with treason or felony. This House, too, has, in effect, jurisdiction, exercised through its committee for privileges, in respect of claims to peerages and offices of honour.

(*b*) *Contempt or Breach of Privilege.*—Both Houses exercise judicial functions in case of contempt or breach of privilege. Sir Erskine May has divided breach of privilege into four classes: (1) disobedience to general orders or rules of the House, (2) disobedience to particular orders, (3) indignities offered to the character or proceedings of Parliament, (4) assaults on or insults to members, or reflection upon their character or conduct in Parliament, or interference with the officers of the House in discharge of their duty.

The person of whom complaint is made is ordered to attend the one House or the other, as the case may be; and, strangely enough, he may receive different punishment according to the House which is concerned. The House of

[1] Tribunal of Inquiry (Evidence) Act, 1921 (11 Geo. 5, c. 7).

Lords may impose a fine as well as imprison the offender; but the House of Commons can, nowadays, only punish by imprisonment. In the case of the House of Lords, the imprisonment may be for a fixed period, and may extend beyond the termination of the session. In the case of the House of Commons, the imprisonment is not for a fixed term, but during the pleasure of the House, so that a prorogation has the effect of entitling the offender to his immediate discharge.

(*c*) *Disputed Elections to Membership of the House of Commons.*—It seems that, prior to the sixteenth century, questions relating to the election of members of the House of Commons were determined by the King in Council; but in the sixteenth century the Commons successfully asserted their right to exercise this function. The position was a difficult one. The Commons were impelled to retain the jurisdiction, as concerning their own constitution; and yet it was apparent that every disputed case would, owing to the inherent frailty of politicians, be treated as one to test the strength of political parties. The Grenville Act of 1770, which provided for the setting up of committees selected by lot for trial of election petitions, was framed to place the procedure in these cases on a more equitable basis.

Now, by the provisions of statutes of the latter half of the nineteenth century,[1] a compromise has been reached. The trial of disputed elections is confided to two judges of the King's Bench Division of the High Court, who are so appointed that it is impossible for the Legislature or the Executive to influence their selection. But the decision and the action to be taken upon it are not matters for the Judiciary. They are retained, if only as a matter of formality, by the House of Commons. When, therefore, the judges have reached their decision, they certify it to the Speaker; whereupon the certificate is ordered to be entered in the Journals of the House and the necessary

[1] Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. c. 75), and Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68).

directions are given by the House for carrying the decision into execution. In the result the House of Commons retain the form of jurisdiction, while the substance of it is in the Judiciary.

In France and the United States the Constitutions provide that each Chamber of the Legislature shall be the judge of matters arising out of the disputed elections; but in the new Constitution of the German Commonwealth, an interesting variation of practice is found. It is provided [1] that an Electoral Commission shall decide disputed elections. The Commission is to consist of members of the Legislature chosen by the latter for the life of the assembly, and of members of the National Administrative Court, to be appointed by the President of the Commonwealth on the nomination of the President of this Court.

Private Bill Procedure—It has already been remarked that the quasi-judicial functions of the Legislature, which are exercised in connection with Private Bill procedure may be traced to a period when the Legislature heard petitions of a character which could not be effectively disposed of elsewhere. At the present day the promoters of a Private Bill and the petitioners (opponents) are much in the position of suitors. They appear by counsel and have to prove their case. If the promoters abandon the Bill, the Legislature, although it may regard it as beneficial to the community, takes no steps to pass it into law. The recovery of costs by the successful party is an additional factor likening the procedure to such as are strictly judicial. It is provided by statute,[2] that, when the Committee of either House of Parliament on a Private Bill decides adversely to the promoter or petitioner, the other party may recover costs to be taxed by the Taxing Officer of the House. Similar quasi-judicial procedure is adopted by select committees of either House on Bills for confirming Provisional Orders.

In the United States this quasi-judicial method of treating Private Bills is not adopted.

[1] Chap. i, sect. ii, art. 31. [2] 28 & 29 Vict. c. 27, sects. 1 and 2.

CHAPTER V

THE FUNCTIONS OF THE JUDICIARY

Judicial Functions—Sidgwick, in his "Elements of Politics," [1] has said that the importance of the Judiciary in political construction is rather profound than prominent. This is a remark which can safely be applied to the functions of the Judiciary in the British Constitution. In the case of other States, like the United States, where the Judiciary is guardian of a written constitution, in the sense that it can declare laws passed by the Legislature to be invalid (but only, be it noted, in the case of a matter being litigated), its influence is, perhaps, more extensive and certainly more obvious.[2]

The functions of the Judiciary are unlike those of the Executive and the Legislature in being exercised without initiative. Yet it must be remembered that, although the Judiciary must always wait until its intervention is invoked, it has a peculiar tactical advantage in saying what, in actual practice, the law is. The Legislature, or the Executive, may have the first word in the working of the constitutional machine; but the Judiciary has the last. An American lawyer [3] put the point in extreme form, when he remarked: "It has sometimes been said that the law is composed of two parts—legislative law and judge-made law; but in truth all the law

[1] P. 181.

[2] The Judicial Committee of the Privy Council can declare laws of Dominion legislatures invalid, subject to the same qualifications as those stated above, where Dominions have written constitutions.

[3] Gray, "Nature and Sources of Law," p. 124.

is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute, as interpreted by the Courts. The Courts put life into the dead words of the statute."

The Judiciary, then, decides the cases which come before it; and this function falls strictly within the standard of "the application of the law with a view to the enforcement of its due observance, so as to effect the defence of rights and the suppression of wrongs." But the Judiciary also exercises certain legislative and executive functions, which have, in practice, been found to be inseparable from its office.

First, it will be convenient to consider, with respect to the Courts' function of deciding cases, how far they make law, or incidentally legislate in the process. The functions which are directly legislative and executive will be left to the latter portion of this chapter.

How Far the Judiciary Legislates when Deciding Cases—(*a*) The system of case law. (*b*) Interpretation of statutes. (*c*) The application of the principle of public policy.

(*a*) **System of Case Law: History**—The Common Law, which, with statute law, is substantially the law administered by the Courts, is compounded in a mysterious way of custom and judicial precedent. In the early stages of the development of the Judiciary statute law, as it has come to be understood to-day, scarcely existed, and the judges had the exclusive power "to lay down what the general custom of England, in other words, the Common Law, for the terms are synonymous in our books, must be taken to be."[1] Thus the consolidation of royal jurisdiction and the adoption of a uniform system of administration of justice, which were outstanding characteristics of early English constitutional history, led to a system of judicial precedent. By the time of Henry III diverse bodies of custom had become unified into the laws and customs of England; and the judges, if a custom was not apparent to fit the case, looked into their consciences and there discovered a rule.

[1] Pollock, "Expansion of the Common Law," p. 48.

In the fourteenth century they frankly characterized their decisions as having the effect of legislation. At this period the self-consciousness, which became evident at a later date, is not discernible. When discussing an avowry by the Statute of Marlborough, Bereford, C.J., declared: "By a decision of this avowry we shall make a law throughout the land"; [1] and Hengham, J., in defining the scope of a writ of deceit, proclaimed: "Consider this henceforth as a general rule." [2]

During the fifteenth and sixteenth centuries the Common Law was even vaunted as a means of reform superior to that of Parliament. It was claimed by a lawyer of the fifteenth century that the class legislation of Parliament was defeated by the national legislation of the judges; [3] and Coke alleged that the judicial decision in *Taltarum's Case* effected a reform which had often been rejected by Parliament. [4]

In respect of the eighteenth century an interesting comparison has been drawn between Lord Mansfield's advocacy and, indeed, his use of judicial authority as a means of effecting reforms in the law, and the advocacy of Bentham, the author of the "Theory of Legislation," of the adoption of the method of enactment of laws by the Legislature. [5]

Until well into the nineteenth century, the main body of the law of the land was judge-made law; and, although subsequently the vast output of legislative enactment has turned the balance more equally, the law which is applied in the Courts to-day is, in very large proportion, the Common Law of England. The following quotation from Professor Dicey's "Law and Opinion," [6] is still sub-

[1] *Venour* v. *Blund* (1310), Y.B., 3 & 4 Ed. 2, 161 (Selden Society Series).

[2] *Anon.* (1305), Y.B., 33 & 35 Ed. 1, 6 (Rolls Series). Both these cases are quoted by Plunknett, "Interpretation of Statutes in Fourteenth Century," p. 22.

[3] Scrutton, "The Land in Fetters," p. 76, quoted by Pollard, "Evolution of Parliament," p. 252.

[4] Pollard, loc. cit.

[5] Dicey, "Law and Opinion," p. 165.

[6] P. 362.

stantially true: "Nine-tenths, at least, of the law of contract, and the whole or nearly the whole of the law of torts are not to be discovered in any volume of the statutes." He further remarks that many Acts of Parliament, like the Sale of Goods Act, 1893, or the Bills of Exchange Act, 1882, are little else than reproduction in a statutory shape of rules originally established by the Courts.

Law-Making by Precedent—The principles on which a judgment given in deciding a case may be applied in subsequent cases cannot be said to be clearly established. The general rule is that only the actual grounds for decision, and not mere *dicta*, are binding upon Courts of co-ordinate and inferior jurisdiction. Lord Halsbury, being desirous of checking the widest applicability of a *ratio decidendi* once said:[1] "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found." He added that "a case is only an authority for what it actually decides," and denied that it could be quoted for a proposition that might seem to follow logically from it.

But a non-reliance on mere *dicta* and an acceptance of Lord Halsbury's qualifications will not preclude a judge from giving a decision. A judge can never say: "There is no statute law on this point, nor can I find any cases bearing on it, so that judgment cannot be given." He cannot propose to delay until the Legislature rectifies the omission. If there are *dicta* applicable, due weight will be given to them. If there is a complete absence of authority the decision must be based on principles of natural justice, though there seems to be occasional hesitation in admitting this.

A notable instance of the creation of law by the Judiciary in the absence of any precedent or other authority is the

[1] In *Quinn* v. *Leathem* [1901], A.C. 495, at p. 506.

case of *Priestley* v. *Fowler*.[1] This case provides the basis of the important rule of "common employment"—that a master is not responsible for negligent harm done by one of his servants to a fellow-servant engaged in common employment. Neither party was able to discover in all the law-reports a decision to quote in his favour. And Lord Abinger, C.B., in giving judgment for the master, observed:[2] "It is admitted that there is no precedent for the present action by a servant against a master. We are, therefore, to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other." The main principle in fact adopted was that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him, and that one of these risks is that of harm due to the negligence or incompetence of his fellow-servants; but it was an entirely novel principle evolved by the Court in that case.

Again, instances can be quoted of the Judiciary basing decisions on natural justice, not so much from the point of view of convenience as of morality. Not many years ago a woman of full age had been convicted of manslaughter,[3] since she had failed to feed and attend to her aunt, an old lady, with whom she lived alone. The case came before the Court of Crown Cases Reserved. It appeared that the old lady had provided the finances of the household, the prisoner being without means; and the former was, during the last ten days of her life, incapable of moving or obtaining outside assistance. The niece apparently entirely neglected her aunt. The law provided for punishment in the case of similar neglect of children, but was silent regarding persons of full age. In these circumstances, Lord Coleridge (in a judgment in which Hawkins, Cave, Day, and Collins, J.J. concurred) remarked:[4] "There is no case directly in point; but it would be a slur upon and a discredit to the administration

[1] (1837), 3 M. & W. 1.
[2] At p. 5.
[3] *R* v. *Instan* [1893], 1 Q.B. 451.
[4] At p. 454.

of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed. . . ." It was decided that the prisoner was properly convicted.[1]

Limits on Legislative Capacity—Does, then, the Judiciary legislate by means of its decisions? A system which admits judicial precedents as binding authorities clearly involves the making of new law by the judges. The Common Law and Statute Law are interpreted and so developed. Additions are made to them. In so far, therefore, as legislation means the making of laws, the Judiciary legislates by means of its decisions; and Bacon's warning that the judge's office is *jus dicere* and not *jus dare* does not constitute a fair distinction. But, in so far as legislation implies a capacity to reverse the existing law, the Judiciary cannot be said to legislate through precedent.

Where there are Courts, one above the other, to which appeal can be made, the Court hearing an appeal is able so to interpret the law as to reverse the decision of the Court below; but it is bound by its own previous decisions, so that, when a case comes before a final Court of Appeal, a point of law once decided by it is or should, it seems, be incapable of reversal by that Court. The House of Lords, in a case decided not many years ago,[2] made its position in this regard quite clear. The Earl of Halsbury, L.C., in giving judgment,[3] observed that "a decision in this House once given upon a point of law is conclusive upon this House afterwards . . . it is impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House be asked to reverse its own

[1] It is not to be assumed that, in cases of absence of authority, the Judiciary always converts moral into legal obligations: Lord Herschell, for instance, in *Derry* v. *Peek* (1889), 14 A.C. 337, at p. 376, insisted that such a creation of liability was a matter for the Legislature.

[2] *London Street Tramways Co. Ltd.* v. *London County Council* [1898], A.C. 375.

[3] At p. 379.

decision." He added that it could not be denied that cases of individual hardship might arise and that there might be currents of opinion in the legal profession that a particular judgment was erroneous, but concluded that such occasional interference as this with abstract justice was not to be compared with the inconvenience of inconclusiveness. Lord Halsbury finally declared that " nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House." Though he did not say so expressly, there is the clear implication that a different decision would involve the Judiciary in the exercise of full legislative functions.

This principle had, perhaps, been weakened by decisions in recent years by the Judicial Committee of the Privy Council. In a case decided by the Committee in 1877,[1] Lord Cairns, L.C., remarked : [2] " In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. The law as to rights of property in this country is, to a great extent, based upon and formed by such decisions." Later in his judgment, however, he observed it would be difficult to hold that decisions on questions of law affecting civil rights were as to third parties, under all circumstances and in all cases absolutely final, but that they certainly ought not to be re-opened without the very greatest hesitation. He then proceeded to point out that the case he was deciding, where the question was, whether or not certain practices were offences against the laws ecclesiastical, was not one affecting civil rights, so that, being a proceeding which might come to assume a penal form, the tribunal, even though of last resort, ought to be slow to exclude any fresh light which might be brought to bear on the subject. The decision was approved in a later case ; [3] but it has only, it seems, been cited in ecclesiastical cases. And, now, no general reliance can be placed on it.

[1] *Ridsdale* v. *Clifton* (1877), 2 P.D. 276. [2] At p. 306.
[3] *Read* v. *Bishop of Lincoln* [1892], A.C. 644, at p. 654.

It will be seen, therefore, that "judge-made law is real law," and is more than "the mere interpretation of law"; [1] but it is not legislation in the full meaning of that term.

Under the Criminal Appeal Act, 1907,[2] section 1 (6), appeal from the Court of Criminal Appeal to the House of Lords (which is now substantially a part of the Judiciary when acting as a Court of Appeal) is only permissible if the Attorney-General gives his certificate that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance, *and* that it is desirable in the public interest that a further appeal should be brought. This section contains an interesting implication that the Legislature regards the function of determining doubtful points of law as separable from that of deciding the cases in which these points arise. It is, however, proper to add that, subject to the remarks to be made later in this chapter regarding declarations of right, the Judiciary will not take upon itself the function of deciding questions of an abstract and general character, until they come before it in actual litigation regarding concrete disputes. The Judicial Committee of the Privy Council has on various occasions refused to adopt this course.[3]

(*b*) **Interpretation of Statutes**—The effect of a decision of the Judiciary based on the interpretation of a statute is similar to that of a decision based on the interpretation of the Common Law. But the principles laid down by the Judiciary in regard to the extent of their powers of interpreting statutes may be discussed under a separate head, since in this respect its capacity is more circumscribed. Moreover, in the interpretation of statutes as opposed to the interpretation of the Common Law, the Judiciary is at the present day under the necessity of regarding the intention of the Legislature, a separate organ

[1] Cf. Dicey, "Law and Opinion," pp. 488 ff.
[2] 7 Ed. 7, c. 23.
[3] Cf. *Attorney-General for Ontario* v. *Attorney-General for Canada* [1916], 1 A.C. 598.

whose position in regard to law-making, at least, is supreme. This distinction has its counterpart in the practice of the Courts; for, when a decision of a Court, not involving the interpretation of a statute has been acted upon without question for a long period of time, it will generally be followed by Courts of higher authority, whatever their own views may be. But the Courts of higher authority do not feel themselves at liberty to adopt this course in their duties of interpreting statutes, where the statutes are unambiguous.

Intention of Legislature—The Courts, then, in interpreting Acts of Parliament must interpret them according to the intention of the Legislature; for it must always be assumed that the Legislature was possessed of intentions in respect of every word of every statute enacted by it. As a matter of hard fact, however, the cases which arise for interpretation are nearly always those in which it is tolerably clear that the Legislature had no real intention at all.[1]

In the early fourteenth century the intention of the Legislature was a matter of personal knowledge to the judges: they attended Parliament, and assisted in drafting statutes. Later in the century, however, when the separation between Legislature and Judiciary was becoming more real, the intention of the Legislature in regard to the important statutes of Edward I was drawn from judicial tradition; and still later, after further constitutional development, the intention was, as at the present time, inferred by reference to the statute alone.[2] What, then, are the rules now followed by the Judiciary in gathering the Legislature's intentions from the words of the statute?

Interpretation of statutes may be divided into two classes: first, the class where the words to be interpreted are unambiguous, and secondly, the class where they are ambiguous.

(i) **Where the Words are Unambiguous**—In this case there must be no questioning by the Judiciary of the in-

[1] Cf. Gray, "Nature and Sources of Law," p. 172.
[2] Plunknett, op. cit., pp. 49-55.

tentions of the Legislature. Since the words admit of but one meaning, the judges, however assured they may be that the Legislature really must have meant something else, cannot give effect to that assurance, subject to the entailment of actual repugnancy. The following remarks of famous judges indicate the strict attitude which is adopted :—

Lord Brougham : [1] " If we depart from the plain and obvious meaning . . . we do not in truth construe the Act, but alter it. . . . We supply a defect which the Legislature could easily have supplied. . . . This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the judges."

Lord Tenterden : [2] " Our decision . . . may in this particular case operate to defeat the object of the Act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act, in order to give effect to what we may suppose to have been the intention of the Legislature."

A remarkable illustration of the dilemma is supplied by a case,[3] in which the point at issue was whether or not a citizen, who had been excused payment of poor rate for one year on account of his lack of means, should for ever be disenfranchized because the statute prescribing the qualifications for registration required that a man must have paid " all poor rates that have become payable." The meaning of these words is perfectly clear, yet the conclusion that he should be unable to be registered as a voter, although he had paid rates in respect of years subsequent to the year when he was excused, was realized by the Court to be unreasonable, and almost absurd; but Willes, J., in giving judgment,[4] repudiated the notion that

[1] *Gwynne* v. *Burnell* (1840), 7 Cl. & F. 696.
[2] In *R.* v. *Barham* (1828), 8 B. & C. 99, quoted in Maxwell, " Interpretation of Statutes," 6th ed., pp. 9, 10.
[3] *Abel* v. *Lee* (1871), L.R. 6 C.P. 365. [4] At p. 371.

" it is competent to a judge to modify the language of an Act in order to bring it in accordance with his views of what is right and reasonable."

There must be mentioned, so as further to delimit the extent of the Judiciary's powers of interpretation, an obsolete principle of interpretation, in pursuance of which it was claimed by the Judiciary that, although a case did not fall within the clear words of a remedial statute, it should by equitable construction be held to be within the remedy, if it were within the general object or mischief of the Act. Various attempts were made in the course of the eighteenth century to revive this principle, sometimes under the description of legislation by construction; but it may now be definitely regarded as dead,[1] like another which flourished centuries ago when the Judiciary was closely allied to the Legislature, namely, the principle of " Exceptions out of the Statute." By this latter principle the Courts, exercising wide discretionary powers excepted particular cases from the operation of statutes, although they contained little or nothing to warrant the procedure.[2]

Comparable to these obsolete principles is one of more recent growth, to the effect that a statute should be construed according to policy or public policy. The Earl of Selborne, in considering the construction of a section of a Bankruptcy Act, suggested to the House of Lords [3] that it is not for the Judiciary to decide matters of this nature " under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the Legislature in the statute or statutes on which the question depends." And, as lately as 1916, Lord Parker,[4] in dealing with this suggested principle (also in a bankruptcy matter), had occasion to remark: " In construing an Act, which, on the face of it is intended to modify public policy for the benefit of

[1] See Maxwell, op. cit., pp. 447-57.
[2] Plunknett, op. cit., pp. 57 ff.
[3] In *Hardy* v. *Fothergill* (1888), 13 A.C. 351, at p. 358.
[4] In *Hollinshead* v. *Hazleton* [1916], A.C. 428.

the creditors of a bankrupt, it would be wrong for any Court of law to limit the plain meaning of the words used by appealing to the public policy intended to be modified. The only policy which such a Court can consider is the public policy embodied in and appearing on the face of the Act itself."

The application of the principle of public policy to decisions on the enforceability of contracts and conditions is discussed under head (*c*) below.

(ii) Where the Words are Ambiguous—Here the Courts are free to indulge in suppositions and to draw inferences. They may look at the circumstances surrounding the passage of the Act in question into law. A dictum, which has often been cited with approval,[1] defines the sources from which the Judiciary may, in the case of ambiguity, ascertain the intention of the Legislature. It may be collected "from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

(*c*) **The Application of the Principle of Public Policy**—This is the third head, under which is discussed the extent of the Judiciary's legislative capacity through the decision of cases.

Few legal expressions have been so variously defined as 'public policy;' and few have been used with less uniformity. For instance, it has been chosen to describe the basis of certain exceptional liabilities in tort.[2] It has been confused, too, with the 'policy of the law,' an expression which, in so far as it has any definite meaning, refers to the trend or object of legal decisions or enactments.

Present Limits of Applicability—The more confined use of the expression 'public policy' in legal terminology is to indicate the ground or standard by which certain types

[1] *Per* Turner, L.J., in *Hawkins* v. *Gathercole* (1855), 6 De G.M. & G. 1, at p. 22.

[2] Cf. Salmond, "Law of Tort," p. 125.

of contract and condition are held void. The ground of public policy is "based on the necessity . . . of preferring the good of the general public to the absolute and unfettered freedom of contract [or disposition] on the part of individuals"[1]—a ground of more than passing interest to the political philosopher. The Court determines, on a balance, whether the interest of the general public will suffer more by allowing the contract or condition to stand good, or more by its interference with the particular individuals concerned. Account is taken of the factor, that this interference may involve a general uncertainty in respect of the effect of the law.[2]

This ground of public policy in accordance with which contracts are held void is different from the ground of illegality, although contracts which are void, merely as being unenforceable, are sometimes mistakenly described as illegal. If a contract is illegal, the position is perfectly plain; and the contract void accordingly. But the principle of public policy does not enable the Courts to declare every kind of contract to be void on the grounds mentioned above. In the course of its historical development, which must shortly be described, the application of the principle has been confined to a limited number of heads or types of contract of undesirable tendencies.

The following heads of contract give a general indication of those which are now accepted as susceptible to the application of the doctrine of public policy.[3]

(i) Agreements tending to injure the State in its relations with other States.

(ii) Agreements tending to injure the public service.

(iii) Agreements tending to pervert the course of justice.

(iv) Agreements tending to abuse of legal process.

(v) Agreements tending to endanger the freedom or security of marriage or the due discharge of parental duty.

[1] *Per* Farwell, L.J., in *Wilson* v. *Carnley* [1908], 1 K.B. 729, at p. 739.

[2] In the following paragraphs the term "contract" alone is often used for convenience when reference is intended also to "condition."

[3] These heads are based on the divisions made by Sir W. Anson in his book on the Law of Contracts.

(vi) Agreements tending to unreasonable restraint of trade.[1]

History of Growth of Principle of Public Policy—As early as the fifteenth century there is evidence that a contract restraining a man from exercising his trade, although not illegal, would probably have been held void on the popular or economic ground, rather than the legal one, that agreements tending to monopoly or the keeping up of prices should be discouraged.[2] This ground is analogous to that of public policy; but it is not apparent that the mediæval mind was prepared to appreciate the notion of the balance of interests involved in the latter ground. But there is no doubt that between the fifteenth and the eighteenth centuries the judges invented and established types or heads of contract, which, although legal, could be held void on general grounds not dissimilar to the present ground of public policy. There was an easy transition from holding one contract void because its object was illegal at Common Law to holding another contract void because it tended too far towards an undesirable end, more or less coincident with the illegal object of the former contract.

At the latter part of the eighteenth century, and even in the first years of the nineteenth, the doctrine of public policy was still relatively undeveloped and uncertain. As early as 1711, however, the grounds for refusing to enforce contracts in unreasonable restraint of trade were given [3] as (i) mischief to the party restrained, and (ii) mischief to the public "by depriving it of a useful member." And in the middle of the eighteenth century Courts of Equity were relieving against contracts, like marriage brokage contracts, on grounds of "dangerous tendency," "public mischief,"

[1] The standard of sexual immorality, although often considered with the principle of public policy is, generally speaking, distinct from it. Contracts, whose object is to do something sexually immoral, are illegal. Those which tend to this class of immorality are probably based on immoral consideration, viz. no good consideration, and are thus invalid for this reason.

[2] Cf. the famous *Dier's Case* (1414), Y.B., 2 Hen. 5, fo. 5, pl. 26.

[3] By Parker, C.J., in *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, at p. 189.

or "public utility," though Lord Hardwicke in a case of this class expressed the surprising view that "political arguments in the fullest sense" must affect the application of these principles.[1] Again, Lord Mansfield, in a case heard in 1775, seems merely to have regarded the doctrine as being based on immorality. "The question," he said,[2] "is whether in this case the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by the positive law of this country;" and he described the principle of "public policy" as being based on the refusal of the Courts to lend their aid to one who grounds his cause of action upon an immoral or an illegal act.

Egerton v. Brownlow, the Principle of Public Policy at its Height—The doctrine of public policy reached a critical stage in the renowned case of *Egerton* v. *Earl Brownlow*[3] in which the free discretion of the Judiciary was strenuously, but unsuccessfully, challenged.

A condition in a will, that a beneficiary should lose his interest, if he did not acquire a certain title, was held to be void on the ground of public policy, although not illegal. At the present day the condition might be classed as "tending to injure the public service" (see head (ii) above).

The House of Lords obtained the opinions of the judges; but did not accept the majority of opinions, which was contrary to the propriety of applying the principle of public policy. The opinions of Alderson, B., and Parke, B. (of the majority of the judges whose opinions were taken), have become famous. Alderson, B.,[4] observed that "it seems to be contended that an act possible and legal, but in the opinion of sensible men not expedient to be done, is for that reason to be void as contrary to public policy," and he asserted that this course "would altogether destroy the sound and true distinction between judicial and legislative functions." He continued: "By this public policy will

[1] *Chesterfield* v. *Jannsen* (1750), 1 Atk. 338, at pp. 347, 352.
[2] In *Holman* v. *Johnson* (1775), 1 Cowp., at p. 343.
[3] (1853), 4 H.L.C. 1. [4] At p. 106.

be meant the prevailing opinion, from time to time, of wise men (and, in saying 'of wise men,' I give a favourable view to the principle) as to what is for the public good—an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for Judges. It is notorious that this would introduce an ever-shifting principle of decision, and that no case hereafter could ever be determined upon precedents, if it was to be adopted." These remarks, no doubt, are in some degree a criticism capable of being levelled at the position at the present day; but it is apparent in reading the opinion that the possibility of a compromise of limiting the heads of contracts and conditions, to which the standard of public policy could be applied, was not present in the judge's mind.

That the notion of a compromise was detected by Parke, B., may be gathered from the passage in his opinion, in which he admits that there were cases which had been well founded "upon the prevailing and just opinions of the public good;" and he cites the heads of covenants in restraint of marriage or trade. These, he said, "have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise." The inference is, perhaps, that Parke, B., did not recognize conditions "tending to injure the public service" as one of the accepted heads.

The judgments in the House of Lords did not attempt any limitation of heads of public policy, though Lord Truro, for instance,[1] quoted definite classes of contract or condition in which the principle had been applied; and, dealing with the objections of Parke and Alderson, B.B., he said:[2] "There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good; there, no doubt, will be occasionally difficulty in

[1] At p. 195. [2] At p. 197.

deciding whether a particular case is liable to the application of the principle, but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law." This, like other remarks in the judgments of the House of Lords, left the whole question in an unsatisfactory position.

Limitation of Scope of Application of Principle of Public Policy—An echo of the opinions of Alderson and Parke, B.B., was heard two years later in a judgment of Lord Campbell, C.J.,[1] who, though feeling himself bound by authority, regretted it. " I cannot help thinking," he remarked, " that, where there is no illegality in bonds and other instruments at Common Law, it would have been better that our Courts of Justice had been required to give effect to them, unless where they are avoided by Act of Parliament. By following a different course, the boundary between judge-made law and statute law is very difficult to be discovered."

Some few years later further symptoms of the compromise, by which ' public policy ' was to be limited to defined ' heads,' were becoming apparent. In a case of 1882,[2] it was contended that a contract between a workman and an employer, which contained a term that the former should not claim any compensation under the Employers Liability Act, 1880, for personal injury, was void, on the ground of public policy. There were no words in the Act forbidding ' contracting out.' It was, therefore, decided that freedom of contract must be maintained; and it is implied in the judgments that the ground of public policy could not be applied because the case did not fall under any of the recognized heads.

The limitation to recognized heads was finally established in the leading case of *Janson* v. *Driefontein Consolidated Mines, Ltd.*[3] The essence of the decision may be extracted from the judgment of the Earl of Halsbury,

[1] In *Hilton* v. *Eckersley* (1855), 6 E. & B. 47.
[2] *Griffith* v. *Earl of Dudley* (1882), 9 Q.B.D. 357.
[3] [1902], A.C. 484.

L.C., in these words:[1] "In treating of various branches of the law learned persons have analysed the sources of the law and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy that they are unlawful; but it is because these things have been either enacted or assumed by the Common Law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy."[2] It is worth remarking that the Earl of Halsbury mentioned with approval the hint in the opinion of Parke, B. (quoted above), that the heads should be limited.

The House of Lords in later cases has paid its respect to this statement of the law; and Lord Dunedin, in *Ertel Bieber & Co.* v. *Rio Tinto Co.*,[3] when speaking in favour of the avoidance of a contract involving trading with an enemy on the ground of public policy, claimed that he was not "inventing a new head of public policy," and referred to Lord Halsbury's remarks.

The Working of the Limitations—But it is not altogether easy to say whether some contracts with undesirable qualities come within what appear to be the recognized heads, and, if so, which of them. The following case provides a useful illustration.[4] A clerk had borrowed money from a moneylender, upon an assignment of salary and upon condition that, *inter alia*, he would not during the period of the loan determine his engagement with his employers or move from his dwelling-house without the lender's consent, and

[1] At p. 491.

[2] The term "unlawful" is sometimes used where the term "void" would be more satisfactory.

[3] [1918], A.C. 260, at p. 273.

[4] *Horwood* v. *Millars Timber, etc., Co. Ltd.* [1917], 1 K.B. 305.

that, furthermore, he would not borrow money or sell or pledge his property. The Court regarded this as a condition of things akin to slavery, and held the contract void on the ground of public policy. But it was argued that such a decision as this would involve the creation of a new head of public policy; and there is much to be said for that view. The Court of Appeal, however, dealt with the case as coming within the head of "tending to unreasonable restraint of trade." Perhaps its indignation at the undesirability of the contract (which appears from the judgments) led the Court to stretch the head of restraint of trade to cover this case.

But, if the decision is based on the debtor's inability to contract freely, it may involve a fallacy, since a greater interference with the freedom of contract may follow from the result of the decision. It is arguable that there is a more considerable interference with freedom of contract from the point of view of the public interest by holding the concluded contract to be void, than by leaving the debtor unable to enter into possible future contracts. It was the tendency to look too closely at the interests of the parties to the exclusion of the real basis of public policy, the interest of the public, which Jessel, M.R., sought to check in his often-quoted plea for the observance of the "paramount policy." [1]

Extent of Judicial Discretion in Application of Principle of Public Policy at Present Time—The Judiciary, then, cannot apply the standard of public policy at large: it can only apply it within the range of what it understands to be the fixed and recognized heads, such as those suggested above. But even within this limitation very considerable discretion remains with the judges. "It is inevitable that the particular case must be decided by the judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles. . . ." [2] The broadness of the judges' law-making capacity follows from the fact that the

[1] In *Printing, etc., Co.* v. *Sampson* (1875), 19 Eq. 462.

[2] *Per* Earl of Halsbury, L.C., in *Janson* v. *Driefontein Consolidated Mines, Ltd.* [1902], A.C. 484, at p. 491.

standard of public policy is an ever-changing one. "Their function . . . is, in my opinion," said Lord Watson in the *Nordenfelt Case*,[1] "not necessarily to accept what was held to have been the rule of policy 100 or 150 years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time." And Bowen, L.J., in the Court of Appeal,[2] described the position even more positively. "Rules which rest upon the foundation of public policy," he said, "not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion or modification. Circumstances may change and make a commercial practice expedient, which formerly was mischievous to commerce." An outstanding instance of a change such as this is discernible in respect of the head considered in the last quoted case—restraint of trade. At an early stage [3] it was thought that any restraint was contrary to the public interest; but nowadays a considerable measure of restraint is held reasonable.

In some classes of case the shifting nature of the standard depends, not so much on changing circumstances as the personal opinion of the individual judge, by whom the standard is to be applied. Particularly is this so in respect of the head—"agreements tending to endanger the freedom or security of marriage or the due discharge of parental duty." Jessel, M.R., in a case where there was involved an agreement by a husband and wife to live separately, admitted that the standard "must be to a great extent a matter of individual opinion, because what one man, or one judge . . . might think against public policy another might think altogether excellent public policy." [4]

The capacity of the Courts to apply the principle of public policy certainly reached its climax in *Egerton* v.

[1] *Nordenfelt* v. *Maxim Nordenfelt Guns, etc., Co.* [1894], A.C. 535, at p. 553.
[2] *Maxim Co.* v. *Nordenfelt* [1893], 1 Ch. 630, at pp. 661, 665.
[3] Cf. *Dier's Case*, p. 67 *supra*.
[4] *Besant* v. *Wood* (1879), 12 Ch. Div. 605, at p. 620.

Earl Brownlow;[1] and of recent years there has been, on the whole, a general reaction on the part of the Judiciary against any extension, a reason assigned being the unassailable one that "judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."[2] There should, in fact, be a definite limit set to the capacity of the Judiciary to refuse to enforce contracts and conditions which appear to them to be undesirable, but which are not illegal. It certainly does not seem that the Judiciary is disposed nowadays to follow the example of Pollock, C.B., in his opinion in *Egerton* v. *Brownlow*,[3] and suggest as a guide for the exercise of judicial functions Coke's principle—*nihil quod est inconveniens est licitum.*

Quasi-Executive Functions—There are functions of the Judiciary which are distinct from that of deciding cases, or, in so doing, of making law—functions which do not come immediately within the definition[4] "the enforcement of the due observance of the law, so as to effect the defence of rights and the suppression of wrongs." But they are functions which are found to be inseparable from the Judiciary's main activities, either owing to that organ's specialized knowledge or to their close interconnection with litigation.

In the first place there are certain secondary functions, which might be characterized as quasi-executive.

(*a*) **Management and Distribution of Property**—The Courts undertake the *management and distribution of property*. For instance, they administer trusts, liquidate companies, realize and distribute insolvent estates. If there is no trustee, or the trustee wrongfully declines to act, or remains in his office and acts improperly, it is obviously convenient, and it is the practice, for the Court to interfere in the management of the trust. So, too, where a trust

[1] *Supra*, see p. 68.

[2] *Per* Cave, J., in *In re Mirams* [1891], 1 Q.B. 594, approved by Lord Bramwell in *Mogul Co.* v. *McGregor* [1892], A.C. 25, at p. 45.

[3] *Supra*, at p. 144.

[4] See p. 12.

estate requires preservation, judges of the Chancery Division with great experience of these matters order the trust fund to be paid into Court.

In the matter of liquidating companies the Court may, under statutory authority,[1] settle lists of contributories, cause the assets to be collected and applied in discharge of its liabilities, require contributories and agents of the company to deliver up to it property to which the company is *prima facie* entitled, and so on.

(*b*) **Titles of Right**—The Judiciary, as another secondary function, may issue *titles of right*, judicial decrees, that is to say, "employed as the means of creating, transferring, or extinguishing rights." Examples are decrees of divorce, foreclosure against a mortgagor, adjudication of bankruptcy, or order in discharge of bankruptcy. These operate as titles of right, and not as remedies of wrongs.[2]

The distinction between functions of this nature and the more regular functions of the Judiciary may be illustrated by quotation of the recognized form of an adjudication of bankruptcy, which reads differently from a judgment. It runs thus:—

"Whereas, pursuant to a petition dated against A.B. a receiving order was made on . And, whereas it appears to the Court that at the first meeting of creditors held on , at it was duly resolved that the debtor be adjudged bankrupt, it is ordered that the debtor be and the said debtor is hereby adjudged bankrupt.

"Dated this day of , 19 ,

"By the Court,

"*Registrar.*"

(*c*) **Declarations of Right**—A further secondary function is that of granting *declarations of right*. The plaintiff, here, may not have a complete and subsisting cause of action;

[1] Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69), sects. 163-166.
[2] Salmond, "Jurisprudence," p. 90.

but, with a view to possible future developments, he thinks it will be convenient if the Court will give an authoritative declaration of his legal position, which can, in effect, form a ground for subsequent proceedings, if the right in question has been violated. Particular examples are declarations of legitimacy or of nullity of marriage. Since the issue of Order 25, Rule 5, of the Rules of the Supreme Court, it is provided that: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not." The validity of this Rule was challenged not long after it was made,[1] but without success. The rule was held to be merely an extension of the practice and procedure of the Court.

The Court has, however, displayed considerable caution in exercising its powers under this Order. It will not, for instance, make a declaration concerning future rights, where all the parties interested are not ascertained, or at all, where the plaintiff endeavours to obtain by the declaration a tactical advantage in other proceedings. Generally, too, there must be a "real, and not a fictitious or academic, question involved."[2] Declarations have been made under this rule to the effect, for instance, that a contract, which a defendant threatened to enforce was invalid, or that defendants were not entitled to send sewage from their district into the plaintiff's sewer without the consent of the plaintiffs.[3]

Advice by Judicial Committee—There is a quasi-executive function of the Judicial Committee of the Privy Council which deserves notice. In addition to its normal duties of deciding appeals, the Judicial Committee, in pursuance of the statute which established it,[4] can have

[1] In *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915], 2 K.B. 537.

[2] *Per* Lord Sumner, in *Russian Commercial, etc., Bank* v. *British Bank for Foreign Trade* [1921], A.C. 438.

[3] See also Order 54 (*a*), rule 1.

[4] 3 & 4 Will. 4, c. 41, sect. 4.

referred to it by the Executive any matter on which advice is desired. The Committee's judgments are, for historical reasons, always in the form of advice; but in the present instance the advice which may be required is advice in the ordinary sense. There is an understanding that no references for advice are made to the Committee in matters which might embarrass its members in the later exercise of their judicial functions. The risk, that is to say, is avoided of there being a suspicion of bias in the administration of justice, because advice on cognate matters has been given to the Executive.

The class of case in which this impartial, highly qualified and respected tribunal can and does give advice includes constitutional questions in regard to colonial or dominion matters, boundary and similar disputes, and the interpretation of treaties. Earl Loreburn, L.C., in delivering the judgment of the Committee in a case in which the validity of a Canadian Act providing for advice being obtained from the Judiciary was considered,[1] expressed the view that, if such Acts as this were abused "manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves." He instanced the request to the Judicial Committee in England for advice concerning the necessity of justices of the peace and judges being re-sworn after the demise of the Crown as one which would not be likely to give rise to untoward consequences; and he asserted that there was no analogy to be drawn from "the almost altogether obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there was ever any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a Court-martial, no instance of such a proceeding has been adduced."

[1] *Attorney-General for Ontario* v. *Attorney-General for Canada* [1912], A.C. 591, at pp. 582-8.

It is a still further cry to the sinister occurrence in Coke's time, when he (in *Peacham's Case*) had to protest against the judges being asked, singly and apart, their opinions concerning a matter, which was to come before them judicially.

Legislative Functions—Powers of legislating are delegated to the Judiciary for analogous reasons to those which account for delegation to the Executive. The legislation in question closely concerns the exercise of the Judiciary's 'proper' functions; and it has special knowledge of what is required.

A Rule Committee, with power to make regulations of pleading, practice, procedure, and costs, and to modify provisions on these subjects in Acts of Parliament, was constituted by the Supreme Court of Judicature Act, 1881.[1] The Committee was to consist of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce, and Admiralty Division, and four other judges of the Supreme Court, appointed by the Lord Chancellor, of which members five or more could make the rules. By the Judicature (Rule Committee) Act, 1909,[2] section 1, two practising barristers and two practising solicitors are now added to the above-mentioned list of members. The present constitution of the Rule Committee, including as it does elements of a professional nature, must be of interest to the political scientist.[3]

The Rules of Court made by the Rule Committee must be laid before both Houses of Parliament within forty days, if Parliament is sitting, and, if not, within forty days of the beginning of the next sitting. Statute also provides that any rules may be annulled by Order in Council, on an address from either House.[4]

Under these provisions the Rules of the Supreme Court were made in 1883; and they have been subsequently amended and elaborated. This remarkable, though com-

[1] 44 & 45 Vict. c. 68.
[2] 9 Ed. 7, c. 11.
[3] Cf. Indictment Act, 1915 (5 & 6 Geo. 5, c. 90).
[4] Judicature Act, 1875 (38 & 39 Vict. c. 77), sect. 25.

plex, code of procedure now includes regulations on such matters as form and commencement of action, service of writ, pleadings, discovery and inspection of documents, admission of evidence, execution, and costs. A recent Act,[1] makes special provision that the rule-making powers include power to regulate the means by which particular facts may be proved, and the mode in which evidence of facts may be given.

There are also individual judicial officers, to whom is delegated power to make rules and regulations regarding special branches of practice and procedure. For instance, the Lord Chancellor, the Master of the Rolls, and the President of the Probate, Divorce, and Admiralty Division are empowered to issue rules in matters coming specially within their purview.[2]

[1] Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81).

[2] E.g. under Matrimonial Causes Act, 1857 (21 & 22 Vict. c. 85), sect. 53, or Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), sect. 20.

CHAPTER VI

INTERRELATIONS OF EXECUTIVE AND LEGISLATURE

"Parliamentary Executive" System—It has been noticed that there are members of the Judiciary, who are also members of the Legislature; and, in this case, the overlapping in the personnel was seen to be attributable to an incomplete separation of the organs following on their emergence from a rudimentary, composite organ of government.

The chief officers of the Executive are also members of the Legislature; but, here, the overlapping is in a large degree due to a partial fusion of the personnel of the two organs after more or less complete separation had taken place. It is now a convention of the Constitution that the heads of the important Executive Departments shall also be members of the Legislature.

There is, however, a further distinction in the two cases of overlapping. In the former case there is no immediate relation between the exercise by the "Law Lords" of their judicial and their legislative functions. In the latter case there is a close relation between the exercise by the heads of the Executive Departments of their executive and legislative functions.

Relics of Suspicion of Parliamentary Executive—The fully developed principle of the partial fusion of the executive and legislative personnel, of the Parliamentary Executive, is of comparatively recent growth. Down to 1689 there was a non-Parliamentary Executive; and after this date the power of government may be said in some sense to have been

shared for a short period by the Executive and the Legislature. But, at that period, the inclusion in the Legislature of members of the Executive was regarded as suspect, since it might give opportunities for the exercise of improper influences. The King was still regarded as retaining sufficient power to be able to interfere with the freedom of action of the people's representatives through the machinations of any of his office-holders in the House of Commons.

The attitude adopted by the Legislature is apparent from the terms of the Succession to the Crown Act, 1707,[1] and, later, in the statute 22 Geo. 3, c. 82. The combined effect of Sections 24 and 25 of the former Act was to incapacitate holders of offices created since 1705 ("new offices") from sitting in the House of Commons, and to require that any holders of "old offices" must on appointment obtain re-election, if they were desirous of sitting in the House of Commons.

In recent years, however, the policy of the Act of 1707 has been severely undermined; and new Acts, as they create new offices for Ministers of State, almost invariably provide that the Minister may sit, if re-elected. Provisions to this effect have been enacted in the case, for instance, of the following Ministers: of Agriculture, of Labour, of Health, of Transport, and of Pensions. Furthermore, a recent Act[2] allows a member who accepts, within nine months after the date of a new Parliament, an office, appointment to which usually requires re-election, to remain in the House without the necessity of being re-elected. There are also special provisions in respect of transfer from office to office.

In the statute of 22 Geo. 3, c. 82, a similar principle to that of the Act of 1707 was at work. This Act of George III confined the number of Secretaries of State who could sit in the House of Commons to two. But, nowadays, owing to the increase in the number of Secretaries of State, statute

[1] 6 Anne, c. 41.
[2] 9 & 10 Geo. 5, c. 2, sect. 1.

has provided that the number of Secretaries of State and Under-Secretaries of State capable of sitting and voting in the House of Commons is five. If six are elected members of the House of Commons, none can sit until the number is reduced.

It is strange that the two statutes of Anne and George III (even as amended) remain to complicate the constitutional position so many years after the principle of a Parliamentary Executive has been firmly established.

Notice may be taken of the fact that, either owing to statutory disability or to conditions of service, permanent or non-political officers of the Executive cannot sit in the House of Commons.

Working of System of Parliamentary Executive—In an examination of the working of the Parliamentary Executive, this body may first be regarded immediately after a political upheaval, when it is necessary for a complete change to be made in the personnel of the heads of the Executive, on the formation, that is to say, of a new Ministry. The new Ministers are appointed, in effect, by the Prime Minister, who is himself the chosen leader of the party which can command, or anticipates that it can command, a majority in the House of Commons. At the opening of the new Parliament, which by statute may last as long as five years, the Executive and Legislature should, in normal course, act in concert and without instability of government. But, as the five years of Parliament proceed, in order that the Executive may not be in the position of governing the country in opposition to the views of the electorate or without obtaining requisite majorities, arrangements of mutual adjustment have come to be evolved.

Constitutional Conventions—The rules followed by the Executive and the Legislature in holding each other in check, and so maintaining the harmony essential to their collaboration and co-ordinated action, are derived from constitutional conventions. It follows, therefore, that the

practice in respect of dissolutions of Parliament with a view to an appeal to the electorate are not definitely fixed.

The possibility at the present day of dissolution of Parliament by the King in opposition to the advice of his Ministers, as happened in 1784 and 1834, is hardly a practical one. It may be assumed that the Sovereign, before so acting, would assure himself that the nation's safety would be endangered unless Parliament were dissolved.

In regard to dissolution of Parliament on the advice of Ministers, it has been understood since mid-Victorian days that dissolution will be approved by the Sovereign as a matter of course, when advice is so given.

The facts, then, leading up to dissolutions of Parliament prior to the accession of Queen Victoria cannot be regarded as throwing useful light on the constitutional position to-day. But observation of the circumstances of dissolutions since that date is instructive for the present purpose.

(1) In the period mentioned dissolution has only followed on six occasions as the immediate result of defeats of Ministries in the House of Commons—in 1841, on the defeat of Melbourne's Ministry on a direct vote of want of confidence; in 1857, on a vote of censure of Palmerston's Ministry regarding affairs in China; in 1859, on the defeat of Derby's Ministry over the amendment to the Reform Bill; in 1868, chiefly as a result of defeats of Disraeli's Ministry a few months before; in 1886, on the defeat of Gladstone's Ministry by an adverse vote on the Home Rule Bill; and in 1924, after the defeat of Mr. MacDonald's Ministry. It is noteworthy that on several of these occasions the defeats occurred at periods when there was in progress a re-assortment of parties.

(2) On four occasions dissolutions were obtained after one Ministry had resigned on defeat and another had taken its place and desired a mandate from the electorate, namely in 1847, 1852, 1885, and 1895. On the second and third of these occasions the date of the dissolution was fixed by arrangement between the parties.

(3) On four occasions the circumstance of dissolution was the approach to the conclusion of the statutory period of Parliament, coupled with diminishing support of the Ministry or adverse bye-elections, namely in 1865, 1874, 1892, and 1906.

(4) On two occasions dissolutions were announced without warning to the opposite party, towards the end of the term of Parliament, at a moment when it was thought that the prospects of success at the polls were propitious, namely in 1880, when Disraeli, though apprehensive of a possible defeat on a projected Bill, was encouraged by a successful bye-election result; and in 1900, when Lord Salisbury's Ministry had nearly brought the South African War to a successful conclusion.

The dissolutions of 1909, 1910, 1918, 1922, and 1923 occurred in circumstances which render them of little value as guiding precedents.[1]

It may be concluded that if the Executive, although it has been able to secure a majority of votes in support of its policy and the legislative measures initiated by it, has reasonable ground for believing that it would obtain a more powerful mandate by means of a dissolution and an appeal to the country, it can be sure that the King will act on its advice to this end. If, on the other hand, the Executive is defeated in the Legislature by a substantial majority on a vote of want of confidence, or on a financial or legislative measure of vital importance, it is its constitutional duty to yield up office or seek a dissolution. The chief sanction available to the Legislature is the refusal to vote the funds which the Executive requires for carrying on the Government. The Executive, although unable to command a majority in the House of Commons, may, in exceptional circumstances, be entitled to obtain a dissolution, rather than allow the other party or parties to form a Ministry in the same Parliament. But it may be

[1] In the case of a "three party" system, such as prevailed in 1924, it is obvious that a Ministry cannot be expected to resign or obtain a dissolution on a casual defeat not involving want of confidence.

observed by way of comparison that the Constitution of the Irish Free State provides (Art. 53) that the Legislature shall not be dissolved on the advice of an Executive, which has ceased to retain the support of a majority in the Chamber of Deputies. It is not altogether clear what evidence of loss of support is required; but this provision can hardly be said to represent the conventional position in this country.

Means of Adjustment—The Executive's means of adjustment—Bagehot's "regulator"—is one which is used with the restraint commensurate to its political possibilities; and it may be noticed that in France this capacity cannot be utilized without the consent of the Senate.

The use of the Legislature's means of adjustment is more infrequent than might be supposed by casual observers of the Constitution, owing to a variety of interacting causes. The changes in the personnel of the Legislature following from bye-elections are unlikely to turn the balance against the Executive; but there are other explanations of the insufficient transfer of voting power during the life of a Parliament.

In the first place, there is an increasing tendency to regard the Member of Parliament simply as a delegate, who is bound by pledges and must follow the instructions of his constituency. This tendency is not entirely peculiar to the British Constitution; but there has been a reaction against it, which is discernible in continental countries. For instance, the Constitution of Switzerland and the recent Constitutions of Esthonia and the German Commonwealth provide that the members of the Legislature shall not be merely delegates. The German Constitution [1] states that they are "representatives of the whole People. They are subject only to their own consciences, and are not bound by any instructions." In France and Italy members "pass lightly from one to another of the various Liberal and Labour groups;" [2] and in the United States of America

[1] Chap. i, sect. ii, art. 21.
[2] Bryce, "Modern Democracies," vol. ii, p. 387.

"a straight party vote is only exacted on the main points of the party programme." [1]

Next, there is the influence of party organization and the obvious advantage to the member who desires promotion to vote with his party. There is what is termed the caucus, a compact group the members of which are pledged on being adopted as candidates to hold together and vote as a united body, whether in a majority or minority. The facts indicate that there is some ground for the conclusion that "the Chamber, having ceased to be deliberative, has become a mere voting machine, the passive organ of an unseen despotism." [2]

Again, there is the undesirability of undertaking the risk and expense involved in fighting for seats in a General Election, which naturally appeals to members who are contemplating a transfer of their vote.

Parliamentary Executive and other Systems—The advantages and disadvantages of the system of a Parliamentary Executive in the British Constitution can best be realized by comparison between the position of the Executive in this country with that of Executives in, say, the United States, Switzerland, and France.

In the United States of America the President is the motive power in the Executive. He is elected for a fixed period of four years; and cannot be removed by the Legislature except by impeachment for grave offences, and cannot have his resignation forced upon him. Subject to the consent of the Senate, he appoints his subordinates in the Executive, including a 'Cabinet,' which is not a ruling group, but which acts under his directions. Neither he nor his Ministers can sit in the Legislature. There is, therefore, a possibility of friction between the Executive and the Legislature; and if their relations are not harmonious, that is to say, if the President's party cannot control both Houses, and especially the Senate, the machinery of government is dislocated. The President may exercise his right to

[1] Bryce, "Modern Democracies," vol. ii, p. 387.
[2] *Ibid.*, p. 388.

veto legislation passed by the Legislature; and conversely the Legislature may refuse to approve treaties or grant money: there may be a deadlock.

In Switzerland the Executive consists of a small administrative council chosen by the Legislature for a short, but fixed, term of years, to act under its direction. The members of the council are not members of the Legislature; but a compromise is adopted whereby they can address it. The main objection to this system appears to be the inability of the Executive to take any effective steps in the initiation of legislation.

In France there is a President elected for a term of seven years by the Legislature; and there is a Cabinet, the members of which sit in the Legislature. In many respects the French system stands in between the British and that of the United States of America. The President is in closer touch with the affairs of government than the King in this country; but, being, as it were, a super-Prime Minister with a powerfully placed Prime Minister and a Cabinet under him, he is less effective than a British Prime Minister. He has, however, the ability to nominate new Prime Ministers and to advise the Cabinet on the conduct of public business, being entitled to call for information on the conduct of national affairs. A French President is personally irresponsible to and not removable by the Legislature, though it may so embarrass him, as to force him into resignation. His condition in this regard, therefore, may be contrasted with that of the President of the United States of America, who is elected by the people, and who, with his 'Cabinet,' is independent of the Legislature. In the French system the Parliamentary Executive stands, so to say, in an intermediate position between a strongly placed Legislature and a weakly placed chief of the Executive.[1] It can only obtain a dissolution of the Legislature by consent of the Senate; and this consent is, in practice, not sought.

[1] Bryce, "Modern Democracies," vol. i, pp. 251 ff.; vol. ii, pp. 18, 79, 101, 507 ff.

Advantages and Disadvantages of Parliamentary Executive—In the British Parliamentary Executive the two organs do not find themselves with a fixed term of years uncompleted, and their views at variance. The mutual means of adjustment renders a deadlock impossible: treaties, if they require confirmation, are not in ordinary circumstances left unconfirmed, and legislation is not vetoed. The presence of the heads of the Executive in the Legislature ensures that the Executive is in touch with the people through their representatives. The system makes for responsible government, and government, as Lord Bryce has said, which is swift in decision and vigorous in action. On the other hand, it has been suggested that the advantages of a division of governmental labour tend to be lost; "ministers are liable to be distracted from their executive duties by the work of preparing legislative measures and carrying them through Parliament, while Parliament is tempted away from legislative problems by interesting questions of current administration." [1] However this may be, as there are arguments in favour of an Executive which knows that it has a fixed number of years in which to carry out its policy and programme, so there can be found disadvantages to place against a system, under which the Executive does not know how to set its plans, since its administration may end at the shortest notice; and connected with this must be reckoned the untoward and unsettling effect of surprise changes in administration not only on home and foreign policy generally, but on trade in particular. As has been seen, however, the British Executive is, in practice, rarely turned out of office by the Legislature.

Checks of Legislature on Executive—A description of the system under which the Executive and the Legislature are able to act in collaboration must be supplemented by an examination of the nature of the checks which the Legislature applies to the governmental activities of the Executive; and in this matter it must be borne in mind that the Legislature is not always in session. It is, in fact,

[1] Sidgwick, "Elements of Politics," p. 444.

only an active organ during, say, rather more than one-half of the year. Provision is made in continental Constitutions to deal with this source of weakness in the ability of the Legislature to check the Executive by the institution of permanent commissions or committees representing the Legislature in the intervals between sessions. Examples of this class of provision are mentioned below.

Maladministration Generally—The time has gone by when the Legislature finds it necessary to arraign before it members of the Executive (the chief of which are before it already) for offences committed in the exercise of its functions. This is partly due to the closer relations of the two organs involved in the system of a Parliamentary Executive, and is partly due to the independent position of, and untainted administration of justice by, the Judiciary, the organ which is best fitted to deal with any infringements of law. In the result, therefore, impeachment and acts of attainder have become obsolete proceedings. It is, perhaps, because of the vital distinction between the Parliamentary Executive and the Presidential system that the process of impeachment is regarded in the United States of America as a live method of constitutional check.

The check adopted by the Legislature by means of the appointment of special committees of inquiry into the administration of the Executive, especially in war administration, though hardly obsolete, is rarely applied. This, too, may follow from the close relations of the Executive and Legislature, as well as from a higher sense of public duty and an increased efficiency of the public service. Examples of the utilization of this check were mentioned in a previous chapter.[1]

In framing the Constitution of the German Commonwealth need was felt for some provision for investigation by the Legislature. Chap. I, Sect. II, Art. 34 is as follows:—

"The National Assembly has the right, and, on proposal of one-fifth of its members, the duty to appoint committees of investigation. These committees, in public sitting,

[1] P. 50.

inquire into the evidence which they, or the proponents, consider necessary. . . . The judicial and administrative authorities are required to comply with requests by these committees for information, and the record of the authorities shall on request be submitted to them."

Production of Executive Documents—The British Legislature is able at any time to order that documents connected with governmental activities shall be laid before it, provided that this course is necessary for its information. The practice is for accounts and papers in relation to trade, finance or local matters to be ordered directly, but in the case of some other or more important documents the Legislature uses the formality of an Address to the Crown. "If considerations of public policy can be urged against a motion for papers, it is either withdrawn, or otherwise dealt with according to the judgment of the House." [1]

Conduct of Foreign Affairs—In dealing with foreign affairs the Executive is, owing to the necessity of the case, bound to be free from a system of minute check. But questions may be addressed in either House to members of the Executive. On the larger matters discussion can be raised in the Legislature without any necessity for support by a prescribed number of members, as in the case of some foreign countries; and the Executive is liable to find itself in a minority on a vote of want of confidence.

The necessity for the Legislature's assent to the making of certain classes of treaties was mentioned in Chapter III above; [2] but it may here be observed that in many countries there have been set up Committees or Commissions of Legislatures to investigate matters relating to foreign policy. Such bodies as these have been constituted in lower Houses within the last ten years in Belgium, Czechoslovakia, Denmark, Germany, Poland, Netherlands, Norway, and Sweden. They were already existing in France and the United States of America.

[1] May, "Parliamentary Practice," 13th ed., pp. 620-3.
[2] P. 15.

In most of these cases the chief function of the Committee is to consider treaties and similar matters referred to it by the Chamber which it represents and to report; but in some cases the Committee examines questions in conjunction with the Executive, for instance, in Denmark and Norway. And in other cases the Executive refers to the Committee to obtain the sense of the Legislature in a particular matter, for instance, in the Netherlands and, possibly, in Japan.

Sometimes the object of the Committee is to represent the Legislature between sessions (Czechoslovakia) or even during a dissolution (Germany).

The Committee which appears to wield the most extensive powers *vis-à-vis* the Executive is that in Germany. This Committee can insist upon the production of documents and information by the Executive, whereas in other countries there is no such absolute right. In the United States of America the application by the Committee for documents and information, although not capable of being enforced, is usually met.[1]

Special Checks in Administration—No special method of check is as a rule imposed by the Legislature in this country in respect of particular administrative duties of the Executive under particular statutes. There are, however, occasional exceptions, an instance of which is found in a recent Act of Parliament.[2] By this Act companies carrying on statutory undertakings were empowered, with the consent of the appropriate Government Departments, to depart in certain respects from the statutory provisions regulating the raising of capital. The Legislature evidently realized the important character of the discretion conferred on the Executive. It accordingly provided that no consent given by a Department in pursuance of the Act should have effect until a report of the circumstances of the case had

[1] See Parliamentary Papers, Miscellaneous, No. 5 (1912), Cd. 6102, and Miscellaneous, No. 19 (1924), Cd. 2282.

[2] Public Utility Companies (Capital Issues) Act, 1920 (10 & 11 Geo. 5, c. 9), sect. 1.

been presented to Parliament by the Department and had lain on the table of each House of Parliament for a period of not less than twenty-one days, during which the House has sat. And if either House during that period raised objection, the consent should not be given. The effectiveness of this method of check depends, of course, on the ability of the Legislature, regard being had to the pressure on its time, to make adequate investigation of the papers laid before it.

Control of National Finance—The Legislature has, from its earliest individual existence, claimed the function of being the sole authority for the raising of money for the purpose of government. The right to exercise this function was formally reiterated in the Bill of Rights, 1688,[1] in which there appeared the clause: "Levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal." The check on the compliance with this principle is usually applied through the Judiciary, and will accordingly call for treatment in a later chapter. It is possible, therefore, to pass at once to an examination of the manner in which the Legislature checks the expenditure by the Executive of money duly and properly raised for the public service.[2]

The partial fusion of the Legislature and the Executive, or the system of a Parliamentary Executive, has rendered the control of national finance by the Legislature a practical proposition. It has been asserted that "in the matter and manner of getting and spending, the Executive is wholly subject to Parliament and has no power to move a

[1] 1 Will. & M., sess. 2, c. 2.

[2] There was, under the provisions of Part II of the Safeguarding of Industries Act, 1921 (11 & 12 Geo. 5, c. 47), a peculiar case of the delegation to the Executive by the Legislature of powers of imposing taxes by the issue of Orders, with the view of preventing "dumping." The checks retained by the House of Commons (under sect. 2 (4)) over the exercise of these powers were, generally speaking, only effective while the Legislature was in session.

hair's breadth beyond the powers which Parliament entrusts to it." [1] How far this statement can be accepted is a question to which some answer is attempted in the following paragraphs.

Estimates and Appropriation—The duties of the Executive in matters of finance are, first, to prepare elaborate tabulated statements, or estimates, specifying the various services, which in the coming year will require expenditure, and the amount of money which will, it is calculated, be required for each head or vote and for the various sub-heads. The object of these estimates is to enable the Legislature, after approval, to appropriate by statute (Appropriation Act) the moneys specified to the prescribed objects. If the Executive desires to expend money on objects to which it has not been appropriated, the defect must be cured by the granting of a supplementary vote and its inclusion in an Appropriation Act. The necessity for a supplementary vote is not avoided by the accession to a Department of unexpected minor receipts (appropriations-in-aid), such as fees, fines, contributions or proceeds of sales.[2]

Authority for Drawing and Spending Money—In the next place, on the occasion for disbursement arising the Executive must see that the money is drawn in the proper and prescribed manner and placed at the disposal of the officers who are authorized to expend it, that there is statutory or other authority for the proposed payment,[3] and that the money drawn is expended on the services to which it has

[1] E. Hilton Young, "The System of National Finance," 2nd ed., p. 6.

[2] There are, however, special provisions, like sect. 91 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), which provides that the Treasury may issue to the Board of Trade, in aid of the votes of Parliament, out of receipts arising from fees, fee-stamps, and dividends from investments, any sums which may be necessary to meet the charges estimated by the Board of Trade in respect of the salaries and expenses of the Bankruptcy Department.

[3] There is a peculiar exception whereby the War Office and the Admiralty may make payments which are not covered by authority, provided they obtain the approval of the Treasury and the payments are reported to the House of Commons. These two Departments are permitted by a "dispensing" Warrant and Order in Council of 27th October, 1884, and 19th

been appropriated (subject to an exception in the case of the Army and Navy, where transfers between votes are in certain circumstances permitted, Parliamentary sanction being subsequently obtained). The Executive has a further duty to take all proper steps to ensure that the money is not only expended on its prescribed object, but also that it is expended with "wisdom, faithfulness, and economy."

Accounts of Expenditure—When these duties have been performed, in so far as human frailty allows, it remains for the Executive to present to Parliament accounts of its financial dealings in the past year. These accounts are known as Appropriation Accounts. They are not merely statements of expenditure, but include classified statements of the appropriation of the various items, so as to enable Parliament to observe the extent to which money has been expended in accordance with authorization. Surpluses and deficits on each vote are set out: the account shows the amount of any unexpended balance, available for surrender into the Exchequer, together with particulars of any excess of expenditure over amounts voted, in respect of which a further grant will be necessary to regularize the position.[1]

Form of Estimates and Accounts—The form of the Appropriation Accounts follows that of the Estimates in so far as the description of the votes or heads and subheads is concerned, so as to render comparison easy. The figures in the Accounts show at a glance the variations between estimated and actual expenditure. The following are examples of the essential portions of the form of Estimates in respect of an imaginary particular vote, and of the form of Appropriation Accounts in respect of the same vote:—

December, 1881, respectively, to deviate from authority "in exceptional cases" by disbursing pay and allowances to military and naval forces at rates or to persons not prescribed in the appropriate regulations.

[1] See Durell, "Parliamentary Grants," p. 17.

Estimate—

I. Estimate of the amount required in the year ending , for expenditure in respect of	£14,000
II. Sub-heads under which this Vote will be accounted for by the Department—	
Sub-head A: Estimated expenditure on salaries	£5,000
Sub-head B: Estimated expenditure on expenses	10,000
Gross total . . .	£15,000
Sub-head C: Deduct estimated appropriations-in-aid [expected minor receipts such as fees]	1,000
Net total . . .	£14,000

Appropriation Account [of actual expenditure]—

Sub-head A: Amount expended in salaries	£4,500
Sub-head B: Amount expended in expenses	9,000
Gross total . . .	£13,500
Sub-head C: Deduct amount actually received by appropriations-in-aid .	1,200
Net total . . .	£12,300

Notes explaining causes of variation between expenditure and grant:—

Sub-head A: Due to closing such and such a sub-head.
Sub-head B: Due to such and such a fall in the price of goods.
Sub-head C: Due to exceptionally fine weather.

The estimated net total was £14,000, and the actual net total of expenditure was £12,300, so that there is a balance of £1,700 on the vote to be surrendered into the Exchequer.

Extracts from estimates, Civil Services, 1922-23, and from the Appropriation Account for the same year will be found in Appendix III, pages 208 ff. Reference should be made to these for full details, e.g. method of stating particulars of estimates of appropriations-in-aid.

Checks on Estimates—How does the Legislature check the Executive in the exercise of these functions? First, it considers the Estimates, and, before voting the amounts desired by the Executive, endeavours to reduce any of the items in them which appear unjustified. That the process of amendment in the House of Commons is not very effective is due to several reasons. The inclination of the private member to reduce the amount of the Estimates, is small. He may easily offend some section of his constituents by endeavouring to do so. The members of the Parliamentary Executive have more interest in general economy, in order that they may defend their stewardship. The Estimates themselves, moreover, are in a form, which to the ordinary man is highly technical and abstruse; and the procedure adopted by the House is cumbrous and inconclusive.

Mr. Hilton Young, in describing [1] the unsatisfactory arrangement by which some votes are discussed twice (in Committee and on Report) and some, owing to pressure of time, not at all, remarks that "a more unsatisfactory state of affairs could hardly be imagined. It reduces the whole laborious process of the control of expenditure by the House to something of a farce." On a more detailed point the comparative futility of the proceedings on the Estimates is illustrated by the same author: [2] "It is to be observed that the sum voted in Committee of Supply for each vote of the Estimates is a net sum; it is the gross sum required for the service of the vote, less the sum to be

[1] "System of National Finance," 2nd ed., p. 62.
[2] Op. cit., p. 59.

appropriated in aid of that service out of the minor receipts of the Department, as specified in the Estimate. The distinction is one of some importance. According to a ruling of the Speaker, a member may not in supply move the reduction of an appropriation-in-aid. Any good reason for this state of affairs it is difficult to see, when a member may move the reduction of the grant itself, but so it is. The effect of the rule is wholly to remove the gross sum estimated for a vote from the control of Parliament. All that Parliament controls is the net expenditure." He then proceeds to point out that the Speaker's ruling is based on the wording of the Public Accounts and Charges Act, 1891,[1] and suggests that the result attained is not that which was contemplated by the Legislature.

It was in consequence of the realization of the ineffectiveness of the proceedings of the House of Commons in these respects that an experiment was made, in 1912, of appointing a Standing Committee on the Estimates. The experiment has not been regarded as a success. Its disadvantages and weaknesses may be tabulated as follows :—

(i) It may be said to involve an encroachment on the proper preserves of the Executive, which might result in a lessening of that organ's due sense of responsibility for the preparation of its scheme of expenditure. (ii) The Committee is unable to criticize elements in the estimates which are bound up with questions of policy. (iii) Since the Estimates are only referred to the Committee after they have been to a large extent or altogether approved by the House, its report can merely be of value in laying down principles for future adoption. (iv) The Committee has not the assistance of an independent technical officer, like the Comptroller and Auditor-General (whose usefulness to the Committee which reports on the actual expenditure of public money, is mentioned below).[2] These problems were among those considered in the Report of the Select Committee on National Expenditure, 1918,

[1] 54 & 55 Vict. c. 24.
[2] See Durell, op. cit., pp. 141-7.

in which suggestions were made for the removal of the disadvantages mentioned under (iii) and (iv) above.

Checks on Expenditure—So far there have been noticed the activities of the Legislature in checking the proposed expenditure of the Executive. It is in the examination of the Appropriation Accounts that the Legislature finds its chief opportunity of checking actual expenditure by the Executive. The Exchequer and Audit Departments Acts, 1866 and 1921, require the Comptroller and Auditor-General to audit and report on these accounts, as well as to report on the amounts of issues from the Consolidated Fund with reference to the relevant provisions of statutes; and under a Standing Order of the House of Commons a Select Committee on Public Accounts (the Public Accounts Committee) is appointed at the commencement of every session to report on the Appropriation Accounts. The Public Accounts Committee derive much of their material for consideration from the reports of the Comptroller and Auditor-General. This officer's position and duties, therefore, may first be observed.

Comptroller and Auditor-General—The Comptroller and Auditor-General is intended to hold a position entirely independent of the Executive, and is thus removable from his office only by the King on an address by both Houses of Parliament. He may not hold his office in combination with any executive office. His salary is charged on the Consolidated Fund, so that it does not come under the annual consideration of Parliament. He may not be a member of the Legislature. Although not an officer of the House of Commons in name, all his functions are, in fact, performed on behalf of the House; and this is clearly the implication to be drawn from the Acts governing his position.[1] He is not, however, appointed by the House of Commons, but by the Executive under letters patent; and the appointee is, in practice, a non-political executive officer

[1] Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), and Exchequer and Audit Departments Act, 1921 (11 & 12 Geo. 5, c. 52), especially the latter.

of high standing. Although the Treasury determine the salary of the Comptroller and Auditor-General's staff, he himself appoints it.[1]

The notion of the Comptroller and Auditor-General's independence of the Executive has been for historical reasons slow in development. Prior to 1866 the Audit Office was a normal Government Department, whose powers were prescribed and controlled by the Treasury. But it has been suggested that the small remaining influence of the Executive over the Comptroller should be removed. The Public Accounts Committee have lately expressed the opinion that his reports, which are made to Parliament through the Treasury, would, in the view of several Departments of State, have more weight if they were presented directly to Parliament, and not through the medium of the Treasury.

It is noteworthy that in some of the recent Constitutions in Europe provision is made that the Comptroller and Auditor-General, or the corresponding officers, shall be the servants of the Legislature and appointed by it. Under Article 123 of the Constitution of the Republic of Austria the Court of Accounts is made directly subordinate to the Legislature, and the President of the Court of Accounts is to be elected on the motion of a Committee of the Legislature. Similarly the Constitution of the Irish Free State (Art. 62) provides that the Comptroller and Auditor-General shall be appointed by the Chamber of Deputies "to act on behalf of the Irish Free State."

Section 1 of the Exchequer and Audit Departments Act, 1921, provides that, in examination of Appropriation Accounts the Comptroller and Auditor-General "shall satisfy himself that the money expended has been applied for the purpose for which the grants made by Parliament were intended to provide, and that the expenditure conforms to the authority which governs it."

Functions of Comptroller and Auditor-General—These duties have been described as of three kinds :—[2]

(i) "An *accountancy audit*, dealing with computation

[1] Act of 1921, sect. 8.

[2] Durell, op. cit., p. 169.

and voucher—that is to say, an investigation of the smaller details to see that no blunders are made in arithmetic, and that the proper receipts in all cases have been obtained; "

(ii) "an *appropriation audit*, of which the object is to make certain that expenditure is charged to the proper head of account, so as to ensure Parliamentary control; " and

(iii) "*an administrative audit*, or audit of authority, to make sure that a particular payment was authorized. He must inquire, that is to say, into the application of money, and its conformity with the directions of Parliament or other authority, which has the power delegated to it of issuing instructions."

This last type of audit, which develops into criticism of wastefulness or imprudence in expenditure, otherwise regular from an accountancy point of view, is in excess of the normal functions of a private auditor;[1] and, in fact, it exceeds the powers conferred on the Comptroller and Auditor-General by the Exchequer and Audit Departments Acts.[2]

In addition to his duties in respect of the audit of Appropriation Accounts the Comptroller and Auditor-General has imposed on him by the Act of 1921 (section 2 (1)) duties of checking the assessment, collection and allocation of revenue by such Departments as that of Inland Revenue; and by sections 4 and 5 he is bound to examine and report to the House of Commons on stock and store accounts and trading accounts of Departments, which keep stocks and stores, or carry on trading activities, but only if so directed by the Treasury.

Public Accounts Committee—The Public Accounts Committee examines the Appropriation Accounts and the report of the Comptroller and Auditor-General upon them, and considers the justification for expenditure by Executive Departments which (i) are in excess of the amount appropriated by Parliament in respect of particular votes;

[1] Durell, op. cit., p. 170.
[2] Cf. Hilton Young, op. cit., p. 155.

and (ii) are otherwise irregular, though they do not create an excess on votes. The Committee also comments on unauthorized expenditure and extravagance, and even on occasion, in the case of quasi-commercial undertakings, on bad business methods.

The Committee's sanction in cases where insufficient justification is found for breaches is not, as a rule, direct. It is not often practicable to recommend that the amount of an over issue shall be disallowed; and the alternative, an intimation of disapproval, cannot be regarded as an entirely effective deterrent. But the influence of the Committee on the Executive is far from negligible: though indirect, it takes some of its force through the channel of public opinion. The rulings and remarks of the Committee are held up by the Treasury as warnings to Departments; and, in general, the Departments treat its reports with careful respect. It is a peculiar fact, however, that Parliament itself has not displayed much evidence of its interest in any strictures passed upon the Executive Departments by its own Select Committee.

There is a disability, which the Committee must, from the nature of government, continue to suffer. It may be forced to withhold its criticism in the case of the Executive declaring that such and such an alleged extravagance was warranted by reasons of high policy, which cannot be disclosed without prejudice to the public interest. If, in a case of this kind, the matter were pressed in the House of Commons, the point could be brought in issue on a vote of want of confidence.[1]

Cases of Absence of Appropriation—The practice of Parliament only to place appropriated funds at the disposal of the Executive Departments no doubt forces them either to omit provisions of a secret character and to delay provisions of an urgent nature, or alternatively to use funds which have been appropriated by Parliament for some other purpose. There are, however, certain exceptional instances

[1] See Durell, op. cit., p. 126.

where Parliament (i) places limited unappropriated funds in the hands of the Executive to provide generally or particularly for expenditure, which may be unexpected or cannot be predetermined, or for the transfer of moneys overseas, and merely requires an account of how the moneys are in fact spent, and (ii) votes, under general heads, money, in respect of the expenditure of which no account to Parliament is required. In the former class fall the Treasury Chest Fund and the Civil Contingencies Fund, which are permanent funds, kept up to a settled limit, any deficit being replenished at the end of the year, or conversely any surplus being surrendered.

(i) **Where Account is Required**—In the case of the Treasury Chest Fund the relaxation is largely illusory. This fund is a central banking fund under Treasury control, the purpose of which is to assist Departments in the transfer of credits abroad, which are necessary to carry on activities of government overseas. In view of the desirability of diminishing, as far as possible, losses on exchange, the business of transfer is co-ordinated, and the money in the Treasury Chest Fund used accordingly.

This fund should not be used in order to supply Departments with money which they want for expenditure, and especially not for expenditure at home, when votes are exhausted. This course was, in fact, adopted in 1910-11 in extenuating circumstances; but the fund which should have supplied the money, if it had not been empty, was the Civil Contingencies Fund.

The Civil Contingencies Fund, which was created under Treasury Minute, is now limited by statute [1] to £1,500,000. Its object is to provide funds for Departments which have spent amounts appropriated to votes, or which desire to create new votes, the intention being for Parliament to regularize matters at a later date.

Somewhat similar are the special and temporary arrangements made on the occurrence of an event, such as the

[1] Finance Act, 1921 (11 & 12 Geo. 5, c. 32), sect. 52.

outbreak of war, which will obviously necessitate large disbursements of amounts and at times which cannot be foreseen. In this case Parliament grants a lump sum (a vote of credit) to the Treasury and delegates to it the function of checking estimates and appropriating the money; but, as remarked above, account must be made of the expenditure to Parliament.

(ii) **Where Account is not Required**—In the second class of cases, where money is voted for specified objects without requiring account to Parliament, fall grants of money for the Secret Service and "grants-in aid." The latter represent the means of assisting schemes or objects with which the State does not desire such close association as to imply responsibility. Instances are (*a*) grants to bodies like the Royal Geographical Society, (*b*) grants to Public Museums and Galleries to enable purchases to be made, and (*c*) grants for the assistance of overseas protectorates. In some cases special provision is made for audit, and in others it is merely necessary for the Comptroller and Auditor-General to see that His Majesty's Paymaster-General issues the money within the appropriate year.

The Treasury, its Position and Powers—The position of the Treasury in connection with the checks on the management of national finance calls for separate remark. Just as a trading company, for instance, may have an internal as well as an external auditor, appointed to act in an independent capacity, so the Executive uses the Treasury, in conjunction with other Departments' accountant officers, as an internal check on irregularities in matters of finance. And not only does the Treasury scrutinize and apply destructive criticism to Departmental estimates, prior to their presentation to Parliament, and disapprove improper expenditure, but it adopts the practice of giving its approval to expenditure by Departments, which is unauthorized by Parliament, when it is of opinion that there are extenuating circumstances. It then seeks to use its prestige to justify the irregularity to Parliament. But the approval of the Treasury cannot be relied upon in substitution for the

authority of Parliament; and, subject to the qualifications noted in this chapter, the covering approval of Parliament must be obtained in every case. Protest by the Public Accounts Committee has been made in cases where it was thought by the Committee that there was opportunity at the time of the irregularity of obtaining Parliament's authority. It has even been suggested that the Treasury has on occasion usurped the functions of the Legislature.[1] But the admission that the approval of the Treasury is on occasion necessarily given is evidence that the check of Parliament on expenditure of public money is bound to be limited by the supervention of emergencies in government.

The Treasury, it should be noted, has a limited capacity given it by statute[2] for authorizing evasions of the rule that public money must only be spent as appropriated by Parliament. It cannot authorize the expenditure of more money on a vote than that provided for that vote by Parliament; but, if some of the expected minor receipts (appropriations-in-aid), specified as in reduction of the gross total of a vote, do not materialize, and other receipts of an analogous kind unexpectedly accrue, the Treasury may direct that the latter may be treated as in place of the former. For instance, if the gross estimated expenditure on a vote were £1000, and the estimated receipts from *fees* (dealt with as appropriations in-aid) were £100, making the net estimated expenditure £900, and if no *fees* were in fact received, but *fines* to the amount of £100 were collected, directions could be given by the Treasury for the receipts by way of fines to be treated as appropriations-in-aid. Thus the amount of these receipts could be spent on the objects of the vote, as if appropriated by Parliament. In this connection it must be remembered that, by the provisions of the Act last quoted, all receipts in reduction of the gross sum required in any vote are to be deemed "money provided by Parliament," and so only to be used for the purposes of the vote in question.

[1] Durell, op. cit., p. 136.
[2] Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24).

Effectiveness of Checks in respect of National Finance —It has already been observed that the proceedings of the House of Commons concerning the Estimates are to a very large extent ineffective. This defect in the system of check is not a matter of so vital importance if there is an adequate check on irregularity, and more especially on extravagance, in expenditure. The Comptroller and Auditor-General, in preparing his reports on the Appropriation Accounts (i.e. on expenditure) suffers under two limitations, to which he himself has drawn attention in recent reports. First, his reports are made before the Departmental witnesses are examined: this examination only takes place before the Public Accounts Committee. And secondly, his reports "necessarily deal only with a small percentage of cases requiring comment or investigation," and they "afford no indication of the standard attained in the administration of public expenditure taken as a whole." But, in so far as the technicalities of Departmental business and the bulk and form of the accounts allow, the Public Accounts Committee, with the assistance of the report of the Comptroller and Auditor-General, imposes a moderately effective check on irregularities in expenditure. How far it is or can be any real check on extragavance or imprudence is difficult to assess.

The apparent lack of interest displayed by the House of Commons itself in the reports of its Select Committee, is perhaps due in part to the fact that the irregularities and other matters on which comment is made are referable to a period, since which a considerable interval of time has elapsed. This feature was touched upon by the Select Committee on National Expenditure, 1918, which recommended that the Comptroller and Auditor-General should be authorized to report to the Public Accounts Committee on matters needing their attention, as and when they are brought to light in the course of his continuous audit.

The form of the Estimates and Accounts has been freely criticized, as being at the root of defects in control by

Parliament; and, especially, it is urged that the heads are not sufficiently and consistently on objective lines. Instead of items of expenditure being described and divided under subjects, as is done in some instances, they should be more consistently based on the objects of expenditure. A complete adoption of this method would establish a "unit of cost," which would be valuable for comparing the cost of one service with another.[1] But it may be that really effective control cannot be secured without the addition to the present record of sums paid in and out of comprehensive accounts showing outstanding assets and liabilities, and providing a separate treatment of capital outlays and receipts.

The problem of revision of forms and methods to enable the application of a more effective check is complicated by the fact that, when the present system was initiated, less ambitious views of the necessity of control of financial expenditure were held. As Sir John Bradbury remarked in a memorandum for the Select Committee on National Expenditure, 1918: "In criticizing the existing scheme of appropriation of Parliamentary grants it must be borne in mind that the control of Expenditure, in the sense of securing that the various public services are efficiently administered at reasonable cost, was no part of the object which the framers of the system had in view."

Checks by Legislature on Issue by Executive of Subordinate Legislation—The nature and extent of the subordinate legislature powers conferred on the Executive by the Legislature were examined in Chapter III; but it is appropriate here to discuss the checks and controls applied by the Legislature over the exercise of these powers.

The Legislature having absolute and unqualified capacity to make and unmake laws can pass an Act annulling or amending any subordinate legislation of which it disapproves. But, to avoid as far as possible the necessity of this stringent procedure, which might ensue after property and interests had been affected, the Legislature makes a general habit

[1] Subsidiary accounts are occasionally included to assist in this comparative method: see Appendix III, p. 208.

of including in an Act, conferring specific power to issue subordinate legislation, one of the following provisions:—

I. (*a*) That a *proposed rule* [1] shall be laid before the Legislature, and shall be abandoned, if it is not approved in terms by the Legislature within so many days.

(*b*) That a *proposed rule* shall be laid before the Legislature and shall be abandoned if objection is made to it by the Legislature within so many days.

(*c*) That a *rule* shall be laid before the Legislature on its issue and shall be annulled if objection is made to it by the Legislature within so many days.

(*d*) That a *rule* shall be laid before the Legislature on its issue, so that the Legislature may have an early opportunity of annulling it by Statute if it disapproves of it.

II. Sometimes the Legislature adopts an additional course by providing, in the Act conferring the power of effecting subordinate legislation, that, prior to the issue of a proposed rule, it shall be made public, so that citizens or public bodies may make representations; and in suitable cases parties specially interested are enabled to insist on Parliamentary confirmation or independent investigation. There is also an Act of Parliament (to be noticed later) which makes general provisions for publication of certain types of subordinate legislation.

Before giving examples to illustrate the provisions tabulated above, it must be noted that there are occasional instances in which, from intention or oversight, Parliament has afforded itself no means of check in the enabling Act. In the Coal Mines Act, 1911,[2] section 61, the Secretary for Mines [3] may, "by order of which notice shall be given in such manner as he may direct," regulate the supply, use, and storage of explosives at mines. He is not required to apprise the Legislature of the issue of such an order as this. Another instance will be found under I (*b*) below.

[1] The term "rule" is for convenience used in this chapter to include regulations, orders, etc., except where otherwise stated.

[2] 1 & 2 Geo. 5, c. 50.

[3] Substituted for the "Secretary of State" by sects. 1 and 2 of the Mining Industry Act, 1920 (10 & 11 Geo. 5, c. 50).

The comparative merits of the methods of providing special opportunities of checking subordinate legislation and their suitability in varied circumstances may be gathered from the concrete examples given below.

I. Checks on Proposals to Issue Subordinate Legislation —(*a*) Parliament says: We must see the rules in draft; and if we do not approve them in terms within so many days they shall be abandoned.

Section 10 (4) of the Gas Regulation Act, 1920,[1] provides: "Before any special order under this Act is made [by the Board of Trade], it shall be laid in draft before both Houses of Parliament, and such order shall not be made unless both Houses, by resolution, approve the draft, either without modification or addition or with modifications or additions to which both Houses agree, but upon such approval being given the Board of Trade may make the order in the form in which it has been approved, and the order on being so made shall be of full force and effect."

The powers conferred on the Board of Trade by Parliament in respect of the making of special orders under this Act are of considerable importance. Not only may the Department in its turn confer considerable powers on gas undertakers, but it may by its special orders effect results which, previously to the passing of the Act, could only be effected by Provisional Order, confirmed by Parliament. This is evidently the reason why Parliament made provision for the earlier opportunity of check (i.e. before the issue of the order), and for a positive approval by Parliament, rather than a mere absence of disapproval.

Another example, which displays in one sub-section the more positive method of checking draft rules, provided for cases of considerable devolution, and the more negative method (to be exemplified separately under (*b*) below) is section 8 (3) of the Ministry of Health Act, 1919,[2] which runs thus: "In the case of a draft of an Order providing for any transfer of powers or duties to and from the Minister

[1] 10 & 11 Geo. 5, c. 28. [2] 9 & 10 Geo. 5, c. 21.

under sub-sections (2) and (3) of section 3 of this Act or for the establishment of any consultative Councils under section 4 thereof, the Order shall not be made until both Houses by resolution have approved the draft, nor if any modifications are agreed to by both Houses, otherwise than as so modified, and in the case of a draft of any other Order which is required to be laid as aforesaid, if either House before the expiration of such thirty days presents an Address to His Majesty against the draft, or any part thereof, no further proceedings shall be taken thereon, without prejudice to the making of any new draft Order."

(*b*) Parliament says: We must see the rules in draft; and, if we object to them within so many days, they shall be abandoned.

By the Importation of Animals Act, 1922 (session 2),[1] the Executive is, among other powers, given power to make Orders regulating the landing of cattle and suspending the operation of the provisions of the Act regarding the landing of cattle; and section 7 of the Act provides: "Before any order is made under the preceding provisions of this Act, a draft of the Order shall, unless it is either an Order suspending the operation of section 1 of this Act or prohibiting the landing of animals [etc.], . . . be laid before each House of Parliament for a period of not less than twenty-one days on which that House has sat, and if either House, before the expiration of that period, presents an Address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of any new draft Order."

It is to be observed that Orders suspending the operation of a section or prohibiting the landing of animals can be made without any laying of the rules before Parliament for so many days, for the tolerably clear reason that the making of such Orders, as contrasted with the making of other Orders under the Act, may be a matter of urgency.

[1] 13 Geo. 5, c. 5.

Retention of Power to Annul Subordinate Legislation—(*c*) Parliament says: We must see the rules as soon as issued and operative; and, if we object to them within so many days, they shall be automatically annulled.

This is a very usual method of check. It is found in such Acts as the Irish Free State (Consequential Provisions) Act, 1922 (session 2),[1] section 6 (2), the Unemployment Insurance Act, 1920,[2] section 35 (2), and the Ministry of Transport Act, 1919,[3] section 29 (1).

Section 17 (3) of the Air Navigation Act, 1920,[4] which conferred wide powers of issuing subordinate legislation concerning the regulation of aerial traffic, may be taken as typical: "Any Order in Council made under this Act shall be laid before Parliament forthwith, and, if an Address is presented to His Majesty by either House of Parliament within the next subsequent twenty-one days on which that House has sat next after any such Order is laid before it praying that the Order or any provision thereof may be annulled, His Majesty in Council may annul the Order or provision, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder."

It appears that method (*b*) might often with advantage be substituted for method (*c*), in order to prevent rules objectionable to Parliament being in force, even for a few days.

(*d*) Parliament says: We must see the rules as soon as they are issued and operative; and, if we object to them, we shall in this way have an early opportunity of annulling them by statute.

By section 16 (1) of the Gas Regulation Act, 1920,[5] the Board of Trade have conferred on them power to make rules in respect of procedural matters, e.g. publication and service of notices, publication of advertisements, fees, etc.—matters of comparatively unessential importance.

[1] 13 Geo. 5, c. 2.
[2] 10 & 11 Geo. 5, c. 30.
[3] 9 & 10 Geo. 5, c. 50.
[4] 10 & 11 Geo. 5, c. 80.
[5] *Ibid.*, c. 28.

Section 16 (2) merely provides that: "Any rules made in pursuance of this Section shall be laid before Parliament as soon as may be after they are made and shall have the same effect as if enacted in this Act."

The different methods do not appear to have been adopted with any uniformity of principle. For instance, a similar sub-section to that last quoted was included in section 86 of the Coal Mines Act, 1911,[1] by which the Secretary for Mines [2] was enabled to issue general regulations on very broad lines, namely, "for the conduct and guidance of the persons acting in the management of mines," etc., and even for the variation or amendment of one part of the Act itself.

A consideration of methods (*b*), (*c*), and (*d*) suggests that, although they may be excellent in theory in appropriate cases, with several scores of rules, etc., before the Legislature at a time and with no particular members responsible for scrutinizing them, the efficiency of check may in practice be illusory.

In this connection there may be noticed an interesting experiment which aims at throwing a particular responsibility on the Chairman of Committees of the House of Lords and the Chairman of Ways and Means in the House of Commons. For instance, under the Ministry of Transport Act, 1919,[3] section 29 (3), the Minister of Transport, on publication of notice of a proposal to make an Order authorizing owners of undertakings to acquire lands and to construct works, is bound to send to the two Chairmen a copy of the draft Order. If within a stated period either Chairman reports to the Minister that he is of opinion that the proposals are "of such a character or magnitude that they ought not to be proceeded with without the authority of Parliament," the Minister cannot make the Order until the draft has been approved by Resolutions passed by both Houses.

[1] 1 & 2 Geo. 5, c. 50.

[2] Substituted for the "Secretary of State" by sects. 1 and 2 of the Mining Industry Act, 1920 (10 & 11 Geo. 5, c. 50).

[3] 9 & 10 Geo. 5, c. 50.

II. Provisions Providing Public with Opportunity to Protest Against Proposed Subordinate Legislation—Distinct from the statutory arrangements by virtue of which Parliament itself checks the issue of subordinate legislation are the statutory arrangements under which the public, public bodies, or persons specially interested are enabled, either to make representations before the issue of rules or to insist on Parliamentary confirmation or independent investigation. (It will here be necessary to refer more strictly to rules, regulations, orders, etc., as the case may be.)

General Provisions—Some few years after the system of delegating legislative powers became widespread complaints and protests were made that, unlike the case of Acts of Parliament, subordinate legislation was launched upon the public without sufficient warning or opportunity for the making of representations. There was accordingly passed the Rules Publication Act, 1893.[1] Sections 1 and 4 of the Act provide that, whenever a statutory rule (i.e. a rule, regulation, or bye-law, but not order) must by statute be laid before Parliament *on* its issue, forty days' notice of its *proposed* issue must be given in the "London Gazette." The implication is that, if there were a statutory requirement for laying a rule before Parliament before issue, sufficient notice would necessarily so be given. During the prescribed forty days representations may be made by public bodies, which must be duly considered by the "rule-making authority." It is not clear from the Act what the expression "public body" means. If, as in the Prevention of Corruption Acts, 1889-1916,[2] it includes "local and public authorities of all descriptions," its ambit is very wide. It is important to observe that section 1 does not apply to Scotland or in the case of certain excepted Government Departments.

Section 2 of the Act enables a "rule-making authority to go behind section 1 and issue "statutory rules" pro-

[1] 56 & 57 Vict. c. 66. Sect. 3 of the Act deals with printing, numbering, and sale of statutory rules, and is disregarded here.

[2] 52 & 53 Vict. c. 69, and 6 & 7 Geo. 5, c. 64.

visionally without notice in cases of urgency, of which the "rule-making authority" is constituted judge. This facility has been extensively utilized; and provisional rules remain provisional for long periods.

It will be gathered from the foregoing remarks on this Act that its application both to subordinate legislation and to the authors of it is only partial; and that there are means of evasion of publicity even where the Act applies. It should be added, too, that many recent Acts provide that section 1 of the Rules Publication Act, 1893, shall not apply to the delegated legislation made under them.

Special Provisions—Sometimes Parliament provides, in an Act conferring legislative power on the Executive, that notice of a proposal to make Orders (which it will be remembered are not covered by section 1 of the Rules Publication Act, 1893) shall be given in the "London Gazette" or similar place, so that the public may be aware of it. This procedure is sometimes additional to that of laying the draft order before the Legislature; but it is sometimes the only course prescribed. For instance, the Ministry of Health Act, 1919,[1] section 8 (2) enacts that: "Before any Order in Council under this Act (other than an Order appointing a day for the commencement of this Act or any provision thereof) is made, notice of the proposal to make the Order and of the place where copies of a draft of the Order can be obtained shall be published in the "London Gazette," and in such other manner as the Minister thinks best adapted for insuring publicity, and a draft of the Order shall be laid before each House of Parliament for not less than thirty days on which such House is sitting." On the other hand, section 2 (5) of the Mining Industry Act, 1920,[2] which is in similar terms to the above quoted subsection down to the words "insuring publicity," omits the requirement of a laying of a draft before each House of Parliament. The reason for the divergency in practice is not easy to discover.

[1] 9 & 10 Geo. 5, c. 21. [2] 10 & 11 Geo. 5, c. 50.

Parties Specially Interested in Subordinate Legislation—It remains to give illustrations of other more particular provisions of Acts of Parliament, framed with the view of enabling parties specially interested in the subject-matter of delegated legislation to insist on independent investigation before the legislation is issued, or on confirmation by Parliament before it becomes operative.

The Coal Mines Act, 1911,[1] section 86, confers on the Executive considerable powers of making regulations, by Order, in regard to the management of mines. Sub-section 3 of the section obliges the issuing authority to publish notice of proposals to make Orders, so as to inform persons affected. If objections of a certain class are made, it is incumbent on the issuing authority to refer the matter to a panel of referees; and effect must be given to their recommendations, if the Order is made.

An illustration of a different method is supplied by the Salmon and Freshwater Fisheries Act, 1923.[2] Under sections 37 and 38 of this Act the Minister of Agriculture is empowered to issue Orders of various classes, for the regulation of fisheries. Section 40 (4) provides that, if within a set period of the issue of an Order no memorial against it is presented and maintained by any fishery board, local authority, or other person or association interested, the Minister may confirm the Order; but, in case of objection, the Order is to be provisional only and must be confirmed by Parliament, if it is to become operative.

It is not difficult to appreciate that, in the case of special interests and occupations, which a paternal Government finds it necessary to regulate, the old method of relying on representations through the Parliamentary representative is not sufficiently effective. The Legislature, as at present constituted, represents areas and not occupations; and, unless and until any such modification as that of recognizing or establishing Functional Councils is introduced, the means of safeguard of the kind illustrated above effect, no doubt, a suitable compromise.

[1] 1 & 2 Geo. 5, c. 50. [2] 13 & 14 Geo. 5, c. 16.

The Constitution of the Irish Free State provides (Art. 45) for the establishment by the Legislature of Functional or Vocational Councils representing branches of the social and economic life of the nation. In this country some approach has been made to this end by the introduction of provision, in Acts dealing with technical matters, for advisory committees to be consulted by Ministers in carrying out their duties under the Acts. Examples are the Dyestuffs (Import Regulation) Act, 1920,[1] the Mining Industry Act, 1920,[2] and the Ministry of Transport Act, 1920.[3]

A cautionary word may be added in regard to all checks by the Legislature on the Executive, to the effect that, while, as at present, the Legislature is during the course of a Parliament very much the tool of the Executive, the efficacy of these checks is correspondingly diminished, quite apart from their intrinsic value. But a further investigation of this aspect of the relations of the two organs is pursued in the next chapter.

[1] 10 & 11 Geo. 5, c. 77. [2] *Ibid.*, c. 50.
[3] 9 & 10 Geo. 5, c. 50.

CHAPTER VII

THE QUESTION OF PREDOMINANCE

AFTER a view of the interrelations of the Executive and the Legislature—the Parliamentary Executive at work, and the manner in which the Legislature controls or checks the Executive in the exercise of the latter's functions, it may be useful to consider, as it were parenthetically, the question of predominance. Can one of the two organs be said to be supreme, or to be superior to the other?

Sovereignty—This question seems, perhaps, reminiscent of the much-canvassed investigation into the seat of 'sovereignty' in the State, an investigation which has, of recent years at least, been regarded with detachment or disinterest by the lawyer, who is not also a student of political philosophy. It is not the intention here to enter into any full discussion of the theory of sovereignty; but a few words will serve to place the subject in relation to that under immediate treatment.

"Early theories of sovereignty," as Maitland has remarked,[1] "belong rather to the domain of political philosophy than to that of constitutional law." It is enough, then, to note that the student of the early nineteenth century was impressed with the doctrine that sovereignty or supreme power in the State must, first, reside in one body or person, or one collection of bodies or persons. It must be undivided. Secondly, it must be independent of all control. It may be suggested as tolerably clear that at the present day no such sovereign as this exists in the British Constitution.

[1] "Constitutional History," p. 298.

Modern Definitions of Sovereignty—Lord Bryce defines[1] the sovereign authority as "the person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power, either of laying down general rules or of issuing isolated rules or commands whose authority is that of the law itself." This definition at first sight, and read in conjunction with the earlier notions of undivided and independent sovereignty, seems to be inapplicable to the facts of to-day. But Lord Bryce finds no difficulty in discarding the traditional characteristics. He boldly declares[2] that "legal sovereignty is capable of being divided between co-ordinate authorities, or of being from time to time interrupted, or rather overridden, by the action of a power not regularly at work;" and he proceeds to assert that by a division of sovereignty legislative functions may be assigned to one authority and executive functions to another. If there must be a 'sovereign' in the constitutional system, and the meaning of the term may be so modified to fit the case, this solution, though involving a dualism, has something to commend it.

Sir John Salmond, in his book on Jurisprudence, in which he trenches considerably on the realms of Constitutional Law, after wrestling with the theory of sovereignty, decides also that the English Constitution recognizes a "sovereign executive no less than a sovereign legislature," each supreme in its own sphere. He even finds it necessary to suggest that when there is no Parliament, that is to say, in the interval between the dissolution of one Parliament and the convening of another, the supreme legislative power is non-existent, but that the supreme executive power is retained. These are the straits into which the inventors of the theory of sovereignty have driven legal scientists.

The 'sovereign' of the type discussed above exists, as Lord Bryce held, in the realm of legal science; but in the realm of fact he found another type of 'sovereign' (a body which prevails in the ultimate resort)—the people or the

[1] "Studies in History and Jurisprudence," vol. ii, p. 51.
[2] Op. cit., p. 54.

electorate; and this he named the practical sovereign. Here, at least, he was able to proclaim an undivided sovereignty. Professor Dicey reached a similar conclusion, when he differentiated between 'sovereign' in the legal and in the political sense. This use of the term 'sovereign' in respect of two altogether distinct spheres has been subjected to criticism;[1] and it cannot be said to simplify an already strained and artificial conception.

Professor Dicey's definition of legal sovereignty is less complicated and easier to satisfy by reference to the facts than that of Lord Bryce. But it is not, perhaps, sufficiently comprehensive, if the earlier connotation of the term is to be retained. He defined it as "the power of law-making, unrestricted by any legal limit,"[2] and was at once able to point to the Legislature as the sovereign of the State. The Executive, therefore, was left by him to be dignified by another name.

Application of Modern Definitions of Sovereignty—Other jurists have taken the boldest step and have suggested that there may be no sovereign at all. Professor Gray, for instance,[3] has proposed that the organs of government may be so limited that there are certain acts which they cannot perform. Independent and unlimited power, it must be remembered, has generally been held to be an essential quality of sovereignty, although Lord Bryce thought, exceptionally, that legal sovereignty could be limited, as in the case of power reserved to the people, to be exercised by Referendum or Initiative. But there are other eminent authorities, like Sir William Anson, who saw[4] the organs of the State "in established relations" to each other, of such a nature as to render a full-bodied conception of a sovereign inadmissible.

This discussion of sovereignty is consciously destructive in character. It seems that the distribution of power in

[1] Sidgwick, "Elements of Politics," p. 658.
[2] "Law of the Constitution," 8th ed., p. 70.
[3] "Nature and Sources of the Law," 2nd ed., p. 78.
[4] "Law and Custom of the Constitution," 4th ed., vol. i, p. 14.

the State cannot be analysed as simply as adherents of a theory of sovereignty proposed. As Sidgwick concludes,[1] supreme power in the State "is usually distributed in a rather complex way among different bodies and individuals;" and the same writer adds the sage warning that "from the mere form of government in any State we can only conjecture very incompletely the actual distribution of the power of producing political effects."

The Change from Autocracy to Democracy—In the early stages of the British Constitution the difficulties which have been mentioned were non-existent. The King with the counsel of his chief men directed the business of the State, and also possessed the "power of law-making unrestricted by any legal limit." On a separation of the Legislature from this primary body, the Executive (which acted rather on behalf of itself than on behalf of the people) retained the power of direction. But, after the Revolution of 1688, the Legislature, with the force of reaction from an autocratic system, took to itself many of the powers of government which are properly the function of the directing organ.

This phase is illustrated by the attempt of Parliament to govern, as well as to legislate, by statute, by passing, for instance, Acts of Parliament to effect ends which are to-day considered to be matters coming within the province of the Executive (see Chap. IV, p. 47). In the late seventeenth century Locke (admittedly a Parliamentarian, with a bias against the Executive) described the Legislature[2] as the "supreme power of the Commonwealth," and he remarked[3] that "the Legislative power is that which has a right to direct how the force of the Commonwealth shall be employed for preserving the community and the members of it."

The Democratic Executive—It was not until the notion of an Executive, acting on behalf of the people and deriving its authority from the people, became fully developed, that

[1] "Elements of Politics," p. 638.
[2] "Treatise on Civil Government," chap. xi.
[3] Op. cit., chap. xii.

a readjustment in the distribution of power commenced. Rapid progress in this readjustment followed the Reform Act, 1832.

In spite, then, of ill-founded inferences, which are occasionally drawn from such expressions as the supremacy of Parliament, few would contend at the present day that Parliament governs as well as legislates. Low, in his "Governance of England" (p. 58), speaks with restraint when he says that "it seems . . . an excessive assumption to maintain that the House of Commons or Parliament does actually and practically in every way directly govern the Kingdom." The laws made by the Legislature must be obeyed by the Executive to the extent to which they apply; but they do not apply to the whole field and to every contingency of government. Necessity for compliance with the laws enacted by the Legislature does not extinguish, but merely affects, the power of direction or government exercised by the Executive.

If a limited liability company were so constituted that the Articles of Association (or regulations for management of the company—the rules of conduct) were made and altered at the absolute discretion of representatives of the members of the company, it could not be said that these representatives *managed* the company. The management of the company would be exercised by the directors, managers, or managing committee, acting on behalf of the members of the company; and no one would allege that they ceased to be managers because they were bound to comply with such regulations as the members' representatives decreed.

The Executive may be the agent of the people; but it is not merely the agent of the Legislature to carry out its behests. Indeed "the picture . . . of a legislature issuing commands enforced by an executive, which in some way may be regarded as part of a legislature, is remote from the facts of our own, and of most, if not all, modern constitutions. . . . The executive does other work besides enforcing obedience to the law." [1]

[1] Anson, "Law and Custom of the Constitution," 4th ed., p. 3.

In the eighteenth century, it may be, there had not been sufficient recovery from the revolt against absolute government to admit of the whole of the directive power in the State being entrusted to the Executive. That similar hesitancy prevailed at that time in the United States of America may be gathered from the absence of any express provision in the Constitution of that country that the directive power should be entrusted to the President.[1] In 1791, Reeves, the author of a history of English law, incurred the extreme wrath of the House of Commons for a suggestion that the Executive was the essential organ, and that the Legislature, though an advantageous institution, could be absent without a complete disorganization of government. But, nowadays, newly modelled Constitutions are not afraid of admissions concerning the real functions of the Executive. For instance, Chapter I, section 1, article 15 of the Constitution of the German Commonwealth provides that " the National Cabinet supervises the conduct of affairs over which the Commonwealth has jurisdiction," while article 60 of the Constitution of the Esthonian Republic explains that " the Government of the Republic directs the internal and external policy of the State, and ensures the preservation of internal and external security and the execution of the laws."

The Executive the Directing Organ—The necessity for a single 'directing power' or 'determining energy' in the State has been pointed out both by constitutional lawyers and political scientists.[2] This directing power or determining energy in the British Constitution is the Executive. The Legislature has been described as the regulator of the Executive;[3] but a regulator of a machine, though it can make it go fast or slowly, or even stop, is not the motive power.

[1] Cf. Goodnow, " Principles of Administrative Law in the United States," p. 77.

[2] Cf. Bagehot, " English Constitution," p. 272, and Bluntschli, " Theory of the State " (transl. Oxford Press, 1885), p. 314.

[3] Sarwey, " Allegemeines Verwaltungsrecht," quoted by Goodnow, loc. cit.

What, then, is the nature of the Executive's directive functions at the present time? Passing over its discretionary capacity exercisable in the administration of statutes, there is a large area of activity, in respect of which the laws passed by the Legislature scarcely apply at all—for instance, the declaration of war and peace, the conduct of war, the conclusion of treaties, in fact, external relations generally. These are functions which have remained with the Executive from the days when a separate Legislature had not been evolved.

There are also functions of a directive character, which the Executive had acquired since the partial fusion of the once separated Legislature and Executive. In the eighteenth century the Executive was chiefly occupied with financial administration; and a legislative programme was not regarded as due from it until perhaps the days of Gladstone. But, as a Parliamentary Executive, it has acquired the lion's share of initiating legislation; [1] and the heads of the Executive alone have power to initiate proposals of expenditure of public money (Standing Order No. 66). The policy of this latter convention is obvious; and it is adopted in more than one Dominion Constitution.

The Executive is found to be the only organ which is equipped to direct the fortunes of the State in the present complexity and technicality of economic and social life. In this work its capacity is reinforced by the inclusion in it of a highly trained and specialist permanent staff of subordinate Executive officers. The growth in number of these officers, constituting the Civil Service, from approximately 20,000 in 1832 to approximately 300,000 at the present time, involving something like a corresponding increase in activity, has necessarily affected the balance in the relations of the Executive and the Legislature.

Moreover, the structure of the Executive enables it to govern or direct affairs. The directing organ must at times act quickly or secretly, or both. And the Legislature accepts

[1] See pp. 18 ff.

this position. The passage of a statute like the Emergency Powers Act, 1920,[1] the provision of votes of credit on suitable occasion, the existence of the Civil Contingencies Fund, or the rule that there need be no disclosure of information to the Public Accounts Committee, which would be prejudicial to the public interest, illustrate the Legislature's acquiescence in, and realization of, this position.

Legislature's Claims to Predominance—Conversely, not only does the Legislature, in fact, abstain from making war or peace or otherwise directing affairs of State, but it is not adapted to these functions. Seeley, in his "Introduction to Political Science," has concluded that, "as a general rule, where a State is subject to any considerable pressure, government by assembly is not found practicable, the reason being that such an assembly has not promptitude or decision enough to deal with pressing danger." It will hardly be disputed that the British State, like the majority of other powerful States, is nowadays constantly and continually subject to "considerable pressure."[2]

There has been no occasion in recent years in this country of a claim being made by the Legislature to direct the foreign affairs of the State. An interesting instance, however, of the defeat of such a claim as this advanced by the Legislature occurred recently in France. A resolution was passed representing that the principle of German disarmament should be maintained at the Peace Conference in 1919. This step was held to be unconstitutional; and the exclusive capacity of the Executive to direct the administration of foreign affairs was vindicated.

It may, therefore, be concluded that the Legislature, without directive power, and having, as has been seen, but limited capacity for introducing laws for the conduct of government, must base any claim to predominance on the rôle played by it as the instrument of the people in creating new Executives,

[1] See p. 28 above.

[2] It is interesting to observe that the Irish Free State has provided in its Constitution that the regulation and control of the armed forces of the State shall be by the Legislature.

and, to a less extent, in bringing about the dismissal of Executives in office. In the latter respect, as was observed in the preceding chapter, the Legislature's exercise of its power of adjustment tends to be infrequent. During the life of a Parliament the usefulness of the Legislature, as such, has been questioned and even ridiculed. Low [1] declares that the private member's influence over legislation is little greater than that of a private individual outside the House of Commons, that he has the opportunity to criticize, object, and suggest, but with little, not more, and perhaps less result that a writer in the press. He characterizes the House of Commons as "scarcely a legislating chamber," and asserts that "it is a machine for discussing the legislative projects of ministers, and only one of the various instruments by which political discussion in these days is carried on." Again, Mr. Stephen Leacock, who, besides being a humorist, is a learned political scientist, has observed facetiously,[2] but with more than an element of truth, that the House of Commons is summoned "to give it an opportunity of hearing the latest legislation and allowing the members to indulge in cheers, sighs, groans, votes, and other expressions of vitality."

That the Legislature's paramount claim to predominance must be based on its effectiveness as Executive-maker is developed by Seeley in his Lectures.[3] As he observed, the Legislature cannot dictate what the Executive shall do; on the contrary the Executive dictates to it. But occasionally it bids it retire; and it is the organ which, in effect, puts a new Executive in its place. Bagehot, also, has described the situation with his usual penetration.[4] "The Legislature chosen, in name, to make laws," he remarks, "in fact finds its principal business in making and keeping an Executive."

Interesting comparisons may be drawn between the

[1] "Governance of England," pp. 60-75.
[2] "My Discovery of England," p. 62.
[3] "Introduction to Political Science," p. 221.
[4] "English Constitution," p. 13.

above-noticed relations of the Executive and the Legislature in this country and those of countries like the United States of America or Switzerland, where the duration of a Parliament is fixed. In Switzerland the Legislature cannot 'break' the Executive at uncertain intervals or at all, but 'makes' it after fixed periods of time. In the United States, however, the Legislature does not create the Executive. This is left to the people. Nor can it 'break' it, since the Legislature's life is fixed. On the other hand, the Executive has not the ability, in the course of the Legislature's life, of dictating the enactment of laws necessary to carry out its policy.

The Question Illusory—In the sense of being a ruler, and having over-mastered the Legislature in the matter of legislation during the course of its office, the Executive has claims to domination over the Legislature. But there is not, accurately speaking, any question of superiority. The Executive is a ruler, like others, dependent on those who make and unmake it.[1] The two organs stand in "established relations" to each other; and their reciprocal interaction is sufficiently well adjusted to prevent one or the other gaining marked ascendancy. No one would now contend, as Hobbes did, that the distribution of power between Executive and Legislature is a source of danger, which can only be removed by settling which should be supreme.[2]

[1] Seeley, "Introduction to Political Science," p. 227.

[2] Many of the remarks in this and the preceding chapter are not applicable to a "three-party" system without some modification.

CHAPTER VIII

THE INTERRELATIONS OF THE EXECUTIVE AND THE JUDICIARY

Judiciary Appointed by Executive—With minor exceptions the members of the Judiciary are appointed by the Executive, and the appointments are generally regarded as being free from political considerations. A similar system obtains in France; but in the United States of America, although the President, the head of the Executive, appoints the federal judges he must obtain the consent of the Senate. Switzerland has proceeded a step further as regards federal judges, the appointment being made by the federal Legislature.

The method of popular election is used in some of the States in America and in the cantons of Switzerland. But in the former case bribery at the instance of powerful corporations has resulted. Election by the judges themselves has obvious disadvantages, so that the present system of appointment in this country, which has been followed in Canada, Australia, and New Zealand, is, perhaps, the best that can be devised.

Judiciary not Removable by Executive—Down to 1700, when the Act of Settlement was passed, the Executive, who appointed, was able to remove its appointees at will. But, since that Act came into force, the tenure of office of the judges of the Superior Courts is "during good behaviour," and their removal can only result from an Address from both Houses of Parliament. These terms are now enacted in the Supreme Court of Judicature Act,

1875,[1] section 5, which also provides that no judge of the Supreme Court is capable of being a member of Parliament.

The effect of the terms of tenure is that, in practice, Addresses for removal are not presented except in the case of moral delinquency. Although the consent of both Houses of Parliament is necessary to an Address to the Crown for the removal of a judge, and while either House can receive a petition respecting a judge's exercise of his duties, it appears that proceedings in respect of a joint address should properly originate in the House of Commons, as being the "grand inquest" of the nation. This principle emerges from the first case in which the parliamentary procedure for removal was utilised, in 1805, in reference to Mr. Justice Fox of the Irish Bench. And, from the course of practice in cases of the first half of the nineteenth century, it may be concluded that the proceedings in both Houses leading up to an Address for removal should be sufficiently of a judicial character that no previous investigation by other tribunals should deprive a judge of full and fair inquiry, and that he should be given information of charges and proper facilities and opportunities for making defence.

The terms of tenure are somewhat similar in the United States of America, France, and Germany; whereas in Switzerland the term of appointment of federal judges is six years. Article 104 of the Constitution of the German Commonwealth orders that judges of ordinary jurisdiction may only be permanently or temporarily removed from office, transferred to another position, or retired against their will by virtue of a judicial decision and for reasons and in forms provided by law.

Judicial Independence. Freedom from Threats or Embarrassment—Since the Act of Settlement it has followed that, once appointed, the judges are outside such influence of the Executive as might be exerted through threats of removal. In this aspect, therefore, the Judiciary have acquired the quality essential to that organ, namely,

[1] 38 & 39 Vict. c. 77.

independence. The removal of County Court judges is hardly a matter in which it is likely that the Executive will wish to intervene. They are removable by the Lord Chancellor for inability or misbehaviour.[1] They may not be members of Parliament.[2]

In another aspect, too, the Judiciary is independent. "It is a principle of our law that no action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly."[3] But County Court judges have not this absolute exemption: they are liable to action being brought against them, if they act outside their jurisdiction, unless misinformed on the facts. They are not liable for slander by them in the course of their giving judgment; and a criminal information is only granted if it is shown that they have acted from a corrupt motive.

Both, then, as regards security of office and freedom in their official capacity from the embarrassment of litigation, the judges are able to exercise their functions "under the protection of the law, independently and freely, without favour and without fear."[4]

Necessity for Judicial Detachment—But it is important that this independence should not be laid open to suspicion, either by political activities on the part of the judges themselves or by their employment by the Executive in extra-judicial duties, the performance of which might lead to a suggestion of political bias. It has been seen that statute forbids the judges from being members of Parliament. There is, moreover, a definite convention that the judges must not take an active part in politics; but to this a special exception must be made in the case of the Lord Chancellor, and a possible exception in the case of other members of the final Court of Appeal for Great Britain. An ex-Lord Chancellor and a Lord of Appeal in

[1] County Courts Act, 1888 (51 & 52 Vict. c. 43), sect. 16.
[2] *Ibid.*, sect. 15.
[3] *Per* Lord Cranworth in *Fray* v. *Blackburn* (1863), 3 B. & S. 576, at p. 578.
[4] *Per* Kelly, C. B., in *Scott* v. *Stansfield* (1868), 3 Exch. Rep. 220, at p. 223.

Ordinary have both recently asserted that they could, without breach of constitutional convention, actively participate in politics, outside their duties as members of the Upper House.

With regard to the employment of judges in extra-judicial functions, whatever objections there may be from the point of view of disorganization, there can be small reason to criticize appointments, for instance, to inquire into riots in Ulster (1886), to form the Parnell Commission (1888), to be President of the Coal Commission (1919), or even to be special diplomatic envoy to the United States of America (1917).

The practice of the Executive to require advice from the Judicial Committee of the Privy Council, under the statute instituting that Committee, has already been mentioned and discussed.[1]

Cases of Executive Officers Exercising Judicial Functions—Experience has shown that there are notable advantages in members of the Executive being also members of the Legislature. The collaboration involved in the system of a Parliamentary Executive is well-nigh essential to the working of the British Constitution. It has been noticed, as a historical survival, that there are members of the Judiciary, who are also members of the Legislature, though their respective functions are kept distinct. But it is impossible to deny the inconsistency with British Constitutional principles of instances in which members of the Executive exercise judicial functions. These, again, are largely historical survivals, yet ones which may seem to prejudice the complete development of judicial independence.

The Lord Chancellor is a member of all three organs of the State. He presides over the Upper House of the Legislature; he is a prominent member of the Executive; he is one of the judges of the Supreme Court and President of the Chancery Division and the Court of Appeal; and he is able also to preside over the final Courts of Appeal. There

[1] P. 76.

seems to be no essential reason why these judicial functions should not be exercised by a separate officer.

The Attorney-General, besides being a member of the Executive (but only exceptionally a member of the Cabinet)[1] and a member of the Legislature, is required to carry out duties very analogous to those of a judge. Where an individual proposes to sue, as a relator, in respect of an injury affecting the public and not himself particularly, he must apply to the Attorney-General for the latter's authority to be joined as plaintiff. The application is judicially considered; and sometimes there is a hearing of the parties before the Attorney-General. A. L. Smith, L.J., once remarked: [2] "We know that he has had from the earliest times to perform high judicial functions," and he instanced the case of a man who, when tried for his life and convicted, alleges that there is error on the record. "He cannot take advantage of that error, unless he obtains the fiat of the Attorney-General; and no Court in the Kingdom has any controlling jurisdiction over him."

A second example given was the power of the Attorney-General to enter a *nolle prosequi* in a criminal case, that is to say, to withdraw the prosecution. A prosecutor may ordinarily ask the judge to allow the case to be withdrawn, and the judge may do so, if he is satisfied that there is no case; "but the Attorney-General alone has power to enter a *nolle prosequi*, and that power is not subject to any control." It is, however, a convention of the Constitution, based on the necessity of judicial independence, that exercise of this power shall be dissociated from political motives.

The Attorney-General has, moreover, definitely judicial powers conferred on him in regard to patents for inventions under the Patents and Designs Acts.[3] Under such Acts as the Moneylenders Act, 1900, the Official Secrets Acts,

[1] E.g. Sir Rufus Isaacs in 1912, Sir Gordon Hewart in 1921-22, and Sir Douglas Hogg in 1924.

[2] *R.* v. *Comptroller-General of Patents* [1899], 1 Q.B. 909, at p. 913.

[3] Cf. *In re Van Gelder's Patent* (1888), 6 R.P.C. 22, mentioned on p. 155 below.

the Seditious Meetings Acts, and the Public Health Act, 1875, his consent to prosecutions is required before they are launched; and under the Criminal Appeal Act, 1917,[1] section 1 (6), there can only be an appeal from the Court of Criminal Appeal to the House of Lords, if the Attorney-General gives his certificate that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought.[2]

Here again, it has been suggested that an exercise of some of these judicial or quasi-judicial functions by independent members of the Judiciary would serve to emphasize the real separation of the organs.

Claims of Judiciary to Non-interference—The Judiciary is not afraid to insist on its unique and peculiar right to administer justice without interference. The Executive, in a recent Canadian appeal before the Judicial Committee of the Privy Council,[3] was a party to a commercial transaction, in respect of which it was under liability to other parties. The Court had granted an injunction restraining these latter parties from receiving monies from the Executive, and later the Executive had paid, in opposition to the intent of the injunction. A spirited protest was made in the judgment of the Judicial Committee against the interference. Sir George Farwell, in delivering the judgment, observed:[4] "There is nothing on which to found a decision which pronounces the Executive free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the Court," adding[5] that "it is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it."

[1] 7 Ed. 7, c. 23.

[2] In several of the instances mentioned, the Solicitor-General is enabled to act in place of the Attorney-General.

[3] *Eastern Trust Co.* v. *McKenzie, Mann & Co. Ltd.* [1915], A.C. 750

[4] At p. 758. [5] At p. 759.

The judgment concludes with the words: [1] "Their Lordships are unable to agree with the decision of the Supreme Court [of Canada] which gives the Executive power to override the judgment of the Court."

Limitations on Setting up Extraordinary Courts by the Executive—In the past the setting up of extraordinary courts by the Executive without the authority of the Legislature has been regarded as an infringement of the rights of the people to have justice administered only by the regular tribunals; but even within the last 100 years a Lord Chancellor, in deciding on the invalidity of letters patent whereby the Crown sought to create ecclesiastical jurisdictions in South Africa, had occasion to reiterate that the Executive cannot, of itself, establish new courts to administer any but the Common Law.[2]

That the possibility of setting up extraordinary courts without legislative sanction is still regarded in other Constitutions as one to be guarded against, is proved by the inclusion of provisions that "extraordinary courts are illegal" and "extraordinary courts shall not be established" in the recent German and Irish Free State Constitutions respectively. And although there is no written Constitution in this country, there are Acts of Parliament which apply to the case. By the statute of 42 Ed. 3, c. 3 (which remains on the statute-book) it was enacted "that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land" (translation). Again, the Act for the abolition of the Star Chamber [3] prohibits the institution of any Court having "the same or any like jurisdiction," and provides that suits by and against subjects shall be "tried and determined in the ordinary course of justice and by the ordinary Courts of law." There are

[1] At p. 760.

[2] *In re Lord Bishop of Natal* (1864), 3 Moore, P.C. (N.S.), 115, *per* Lord Westbury, L.C., at p. 152. See also *Newcastle Breweries, Ltd.* v. *R.* [1920], 1 K.B. 855, and *Cannon Brewery Case* [1919], A.C. 744, mentioned on p. 145 below.

[3] 16 Ch. 1, c. 10.

similar provisions in the Petition of Right and the Bill of Rights.

The application of these statutes has not been considered of late in this country, but in New Zealand and Australia they have been quoted in connection with the appointment of Royal Commissions and similar bodies by the Executive. It was decided that, where the object was merely to inquire whether or not an offence had been committed or rights infringed, there was no trespass on the province of the Judiciary or breach of the statutes 42 Ed. 3, c. 3, and 16 Ch. 1, c. 10.[1]

Exceptional Cases where Executive its own Judge—It must be noticed that, in matters of high policy, where the interests or safety of the public or the defence of the realm are concerned, the Executive may itself be left to be its own judge. "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of Law, or otherwise discussed in public."[2]

This principle may apply both in litigation in which the Executive is directly concerned as a litigant, or otherwise. Some instances of its application in the former circumstances will be considered later in this chapter, in connection with a discussion of decisions on the validity of regulations or acts done under a regulation made for the defence of the realm or safety of the public, and on the legality of the imprisonment of alien enemies, stated by the Executive to be a danger to the public.

Where, in the case of litigation, either between subject and subject or Executive and subject, a party desires to disclose or produce, or to obtain disclosure or production of, information or documents, and the head of the Executive Department concerned objects on the ground of prejudice

[1] See Keith, "Responsible Government in the Dominions," vol. ii, pp. 888-90.

[2] *Per* Lord Parker, in *The Zamora* [1916], 2 A.C. 77, at p. 106.

to the public interest, the Judiciary will generally uphold the objection without requiring any justification.[1]

There is little doubt that this example of the Executive acting as its own judge took its origin in a prerogative right, whereby State documents were regarded as secret. It was inconvenient to the Executive that the substance of intrigues should be made public property. But nowadays, and especially since a recent decision in which the position was analysed,[2] it is firmly established that the rule applies to any document, official or otherwise. "The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production."

It is not altogether clear how far the Judiciary may reject the Executive's claim to privilege, where in the opinion of the Court disclosure could not by any possibility result to the prejudice of the public interest. If the Court has not before it sufficient information on which to decide this question, it is not in a position to obtain it, since investigation of the nature of the document and the chances of prejudice can only take place in public.[3] But it is possible that the Court, learning the nature of the information or document, either from an affidavit of documents in the case of interlocutory proceedings or at the trial, may take the view that there could be no possible prejudice. The Scottish Courts have, in terms, protested that they retain a discretion;[4] and in England a judge has expressed the view that "perhaps cases might arise where the matter would be so clear that the judge might well ask for it [the document], in spite of some official scruples as to producing it."[5]

[1] This privilege of the Executive is to be distinguished from the exemption from liability to "discovery" of documents, which is a general exemption only applicable to cases in which the Executive is a party in litigation.

[2] *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co. Ltd.* [1916], 1 K.B. 822.

[3] Cf. remarks of Pollock, C.B., in *Beatson* v. *Skene* (1860), 5 H. & N. 838.

[4] *Henderson* v. *M'Gown* (1916), S.C. 821.

[5] *Per* Pollock, C.B., in *Beatson* v. *Skene*, *supra*.

He thought, however, that rejection of the claim of the Executive "must be considered rather an extreme case." Lord Esher, M.R., in commenting, in a later case,[1] on this view, evidently appreciated the peculiar situation which would arise if there were to be a conflict on the question of production of a document between the Executive and the Judiciary, the one insisting on its privilege and the other denying that it applied to the case before it. But there are, in fact, no clear instances of rejection of the Executive's claim to privilege in the English Courts.[2]

Examples of Checks on Executive through Judiciary—There are various heads under which the nature and extent of the control exercised over the Executive through the Judiciary may be considered. The heads chosen below are merely illustrative, and are not intended to be comprehensive or even mutually exclusive. They are classes of cases in which there may be considered the liability of the Executive to be brought before the Courts by subjects, on the ground that it has acted in excess of its powers. The following are taken :—

1. Claims by Executive to prerogative privileges and exemptions, generally.
2. Legislation by the Executive.
3. Exercise of statutory powers (*a*) in issuing delegated legislation, (*b*) in doing acts in pursuance of delegated legislation.
4. Personal liberty of the subject.
5. Taxation.
6. Exercise of judicial or quasi-judicial functions.
7. Administration of Fighting Forces.
8. State of War.

1. Claims by Executive to Prerogative Privileges and Exemptions, Generally—Bacon's warning in his essay, "Of Judicature," to the effect that the judges should be lions

[1] *Latter* v. *Goolden*, unreported.

[2] The subject of the non-production of documents in the public interest is treated fully in an article by the present writer in the "Law Quarterly Review," vol. xxxix, p. 476.

under the throne, is duly observed at the present day; but his further suggestion that they should not "check or oppose any points of sovereignty" has properly been neglected.

Prerogative—Professor Dicey points out [1] that the power of the Executive "is in truth anterior to that of the House of Commons," and that, from the Norman Conquest down to the Revolution of 1688, the Executive was entirely supreme. The prerogative, he explains, is the name for the remaining portion of the Executive's original authority or the residue of the discretionary power left at any moment in its hands. "Every act, which the Executive Government can lawfully do without the authority of an Act of Parliament, is done by virtue of this prerogative." But it is not altogether clear that a definition of the prerogative, which suggests that it includes all the Executive's discretionary power, not made the subject of limitation by the Legislature, is satisfactory. It has been pointed out [2] that power and authority over the subjects of an enemy State, possessed by the Executive, e.g. the right to seize and forfeit their private property in the Kingdom, does not come within the prerogative, which extends only over British subjects. But it was concluded that this power and authority might be limited by statute in the same way as prerogative. On the other hand, it has been held [3] that the right of angary, i.e. the annexation or destruction, during war, of neutrals' property, is a prerogative right. The distinction, however, is really one of terminology. The Legislature can limit the general discretionary power of the Executive, as well as a particular kind of discretion, namely, the prerogative. But the terminology may, in some circumstances, become important.

The nature of the evidence in respect of prerogative rights, required by the Judiciary, is a matter of doubt. So,

[1] "Law of the Constitution," 8th ed., p. 421.

[2] By Warrington, L.J., in *In re Ferdinand, ex-Tsar of Bulgaria* [1921], 1 Ch. 107, at p. 139.

[3] *Commercial and Estates Co. of Egypt* v. *Board of Trade* [1925], 1 K.B. 271.

too, is the incidence of liability for proof. In one case[1] Hale, C.J., said: "We are indeed bound to take notice of everything that belongs to the Queen's privilege;" while in another[2] it was said: "We are agreed that it is for the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation."

How Limited—The case of *Attorney-General* v. *De Keyser's Hotel, Ltd.*[3] is one of great constitutional importance, in that it throws much light on the manner in which statutes passed by the Legislature may abridge the royal prerogative, as well as touching on the allied question of the requisites of form or intention in statutes in order to render them binding on the Executive.

In this case the Executive requisitioned, in 1916, a hotel in London to accommodate the headquarter's personnel of the Royal Flying Corps, and retained possession for nearly a year. The hotel was not taken under agreement, but under protest. The parties were unable to come to an amicable arrangement regarding payment for the use of the building; and consequently proceedings by way of petition of right were instituted. On the one hand it was contended that there should be paid a fair rent or compensation, and on the other that no rent or compensation was in law payable.

The Defence Act, 1842,[4] which followed other Acts of a similar nature, provided a code for the regulation of the acquisition of lands and interests in land for the purposes of the defence of the realm. Acquisition could be either by agreement or compulsory; and elaborate procedure was prescribed in respect of requisition. Notices, applications and the like were to be given and made. Provision was made for compensation.

The Defence of the Realm Consolidation Act, 1914,[5]

[1] *Elderton's Case* (1703), 2 Ld. Raym. 978, at p. 980.
[2] *Attorney-General to Prince of Wales* v. *Crossman* (1866), 4 H. & C. 568, at p. 575.
[3] [1920], A.C. 508.
[4] 5 & 6 Vict. c. 94.
[5] 5 Geo. 5, c. 8.

section 1, enacted that the King had power during the war to issue regulations for securing the public safety and the defence of the realm, and that these regulations might provide for the suspension of any restrictions on the acquisition or user of land under the Defence Act, 1842. A regulation under the Act of 1914 was issued, which empowered Naval and Military Authorities to take possession of land or buildings, "when for the purpose of securing the public safety or the defence of the realm, it is necessary to do so."

The House of Lords decided that the Act of 1914 and the regulations thereunder merely brought the Act of 1842 into operation and did not confer on the Executive a power to take the hotel without compensation. It was held that the regulations merely enabled the authorities to take possession immediately, without compliance with the "restrictions" or formalities prescribed by the Act of 1842.

With regard to the question of any alleged prerogative right to take land without compensation, the House of Lords took the view that "the whole field of the prerogative in the matter of the acquisition of land" was covered by the Act of 1842, and that, therefore, there was no prerogative right left (*assuming that any such right as this ever existed*) to take land without paying compensation. Swinfen Eady, M.R., put the point succinctly in the Court of Appeal;[1] and his words were approved in the House of Lords: "Those powers which the Executive exercises without Parliamentary authority are comprised under the comprehensive term 'prerogative.' Where, however, Parliament has intervened and has provided by statute for powers previously within the prerogative being exercised in a particular manner and subject to the limitations contained in the statute, they can only be so exercised. Otherwise what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back upon prerogative?" And Lord Parmoor remarked

[1] [1919], 2 Ch. 216.

in the House of Lords:[1] "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the royal prerogative of the Crown, but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. . . . It would be an untenable proposition to suggest that Courts of Law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme."

Statutes which Bind the Executive—Both Lord Parmoor and Lord Atkinson dealt with the principles of construction to be applied in deciding whether the prerogative is taken away or abridged.

There is an ancient, and possibly unsound, dictum that the law is *prima facie* presumed to be made for subjects only.[2] However this may be, the general rule is that the Executive is only bound by a statute in any case where it would be ousted of an existing prerogative or interest, either by express words or by necessary implication.[3] But there is a fairly well-established extension (if extension it be) of the principle, often based on a passage in Bacon's "Abridgement,"[4] that the Executive is bound by any Act made "for the public good, the advancement of religion and justice, and to prevent injury and wrong," although not particularly named. A picturesque enunciation of this view is found as early as 1601 in the decision in the *Case of Ecclesiastical Persons*,[5] thus: "All statutes which are made to suppress wrong, to take away fraud, or to prevent the decay of religion shall bind the King, although he be not named, for

[1] At pp. 575-6.
[2] *Willion* v. *Berkley* (1562), Plowd. 222.
[3] *Perry* v. *Eames* (1891), 60 L.J. Ch. 345.
[4] 7th ed., vol. vii, p. 462.
[5] (1601), 5 Co. Rep. fol. 14.

religion, justice, and truth are the sure supporters of the crowns and diadems of Kings. . . . The King, being head of the Commonwealth, cannot be an instrument to defeat the purview of an Act of Parliament made *pro bono publico*." It may, however, sometimes be arguable that an Act passed for the public good, etc., is by "necessary implication" binding on the Executive.

In the *De Keyser Case* Lord Atkinson thought that the main test could be applied as well as the so-called extension, since the statutes in question dealt with the defence and security of the realm. Lord Parmoor was of opinion that "statutes which provide rent or compensation as a condition to the right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency" came within the extended principle.[1]

Executive Bound by Necessary Implication in Statutes—The extent to which the Executive is bound by "necessary implication" is illustrated by the case of *Food Controller* v. *Cork*.[2] By this decision it was settled that the Executive has no longer any general and prerogative right to be paid debts due to it by an insolvent company, which is being wound up, in priority to other creditors.

The case turned on the construction of the terms of the Companies Consolidation Act, 1908.[3] This Act contains no express provision that the Executive is deprived of its right to priority in payment of debts. But by section 186, it is enacted that the property of the company is to be applied in satisfaction of its liabilities *pari passu*; and, by section 209, priority was given to a variety of specified debts including certain classes of debts due to the Executive, e.g. debts due in respect of income tax. It was pointed out in the judgments in the House of Lords that, read without explanatory additions, these two sections are inconsistent;

[1] Rowlatt, J., held in *Attorney-General of Duchy of Lancaster* v. *Moresby* [1919], W.N. 69, that an Act granting relief to tenants from compliance with covenants during the war in case of serious hardship bound the Executive, in pursuance of the extended principle.

[2] [1923], A.C. 647. [3] 8 Ed. 7, c. 69.

but the decision was based on a reading of them in conjunction. Since a priority is given to the Executive in respect of specified debts by section 209, the Executive must, it was held, take *pari passu* under section 186 in respect of debts other than those specified.

Lord Atkinson thus explained the reasoning:[1] "Sections 186 and 209 must, as far as possible, be reconciled the one to the other and construed together. Section 186 would thus become binding on the Crown, inasmuch as section 209 qualifies it and restricts the area of reach of section 186. The latter section must, therefore, be read as if the words "save as hereafter provided" were written into it. And this, I think, is clear, that all the property of the company not needed to implement section 209 is irrevocably dedicated by this section 186 to the satisfaction of the liabilities of the companies (which, of course, must include debts) *pari passu*. Thus interpreted, this statute clearly deprives the Crown of all right to priority for any debts due to it other than that given by section 209."

It will be seen from *Cork's Case* that the "necessary implication" reaches far. There is, perhaps, little doubt that the Legislature never had any intentions in respect of the Executive's general right to priority. On the other hand, now that the Executive's interests are, from the financial standpoint, coincident with those of the public, it seems that in cases such as this assistance in ascertaining the intention of the Legislature may be gained by considering whether a limited number of citizens were intended to benefit at the expense of the citizens (or taxpayers) at large.

An example of the Court refusing to accept a contention that the Executive is bound by "necessary implication" occurred recently in regard to the question of the applicability of interpleader rules to the Executive.[2] The general principle that the Executive cannot be made to submit to the jurisdiction of the Courts against its will was thought

[1] At p. 663.
[2] *The Mogileff* (No. 2) [1922], P. 122.

to be sufficient to negative any implication that the Executive is bound to appear before the Courts on an interpleader issue, and, after being heard, to abide by any order which might be made.

2. Legislation by the Executive—It was seen in discussing the functions of the Executive that, apart from powers of legislation in respect of Overseas Dominions and Protectorates and other special cases, which have been retained, the Executive has yielded up to the Legislature all its early powers of legislation.

The manner in which the Judiciary will, in effect, check the Executive in an attempt to assume independent legislative powers is well illustrated in *The Zamora*.[1] The Prize Court Act, 1894,[2] conferred on the King in Council (in substance the Executive) power to make rules concerning the *procedure and practice* of the Prize Courts. Order XXIX, rule 1 (one of the rules issued by the Executive) provided that, where it was made to appear to the judge, on the application of the proper officer of the Crown that it was desired to requisition, on behalf of His Majesty, a ship, in respect of which no final decree of condemnation had been made, the judge should order that the ship be appraised, and, upon an undertaking being given in accordance with rule 5 of the Order, the ship should be released and delivered to the Crown.

This rule is, on the face of it, not merely concerned with practice and procedure in the proper meaning of those terms, but comprises an imperative direction to the Court. It was contended by the Attorney-General that the Executive had, apart from the powers conferred by the Prize Court Act, 1894, a power by virtue of prerogative to legislate in the manner implied by the imperative direction.

Lord Parker of Waddington[3] thus reiterated the constitutional position: "The idea that the King in Council or indeed any branch of the Executive, has power to pre

[1] [1916], 2 A.C. 77. [2] 57 & 58 Vict. c. 39.
[3] At p. 90.

scribe or alter the law to be administered by the Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity." Lord Parker then proceeded to dispose of the suggestion that the special relation of the Executive to the Prize Courts and the nature of their jurisdiction differentiated them from other Courts in respect of the matter in issue.

3. Exercise of Statutory Powers—(*a*) *In issuing Delegated Legislation*—In *The Zamora* the Executive definitely claimed independent legislative power, but without success. There are, however, as Lord Parker remarked, other cases where the Executive has had delegated to it by the Legislature powers of issuing subordinate legislation within the limits prescribed by statute. In these circumstances it becomes incumbent on the Judiciary to decide in particular cases whether the delegated legislation falls within the powers specified in the enabling statute. The nature of the Executive's functions in respect of delegated legislation and the steps taken by the Legislature to control the exercise of these functions have been mentioned in Chapters III and VI, above.

Very often during the war of 1914-1918, when much delegated legislation was issued by the Executive under the Defence of the Realm Acts, plaintiffs contended that regulations, etc., were *ultra vires* the statutes, under which they purported to be made, and further that, if the regulations were good, acts done by the Executive under the regulations were *ultra vires* the regulations. The occasional failure to distinguish between the question of the validity of a regulation and that of the validity of an act done under a regulation has resulted in confusion of thought. It is

proposed, therefore, to deal with the subjects separately, in so far as this is possible.

The extensive power of issuing delegated legislation conferred on the Executive by the Legislature by the Defence of the Realm Consolidation Act, 1914,[1] section 1 (1), renders the cases in which the validity of this delegated legislation was questioned specially useful as illustrations. This Act conferred on the Executive power during the war "to issue regulations for securing the public safety and the defence of the realm."

Cases where only Partial Check through Judiciary on Issue of Delegated Legislation by Executive—In the early stages of the war it was felt that regulations issued under these powers would be difficult to challenge in the Courts. If the Executive declared that a certain course was necessary for securing the public safety and the defence of the realm, could its word be taken in question?[2] "It by no means follows," said Lord Atkinson in 1917,[3] "that, if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm, it would not be *ultra vires* and void." It was, however, not necessary to decide this precise point on the occasion of this remark.[4]

But instances are found later in the war of regulations being held by the Courts to be incapable of securing the public safety and the defence of the realm. A regulation provided that no person should without the consent of the Minister of Munitions take proceedings to recover possession of houses in certain areas so long as munition workers were living in them. The Court thought that there might be no objection to a regulation providing that no order for ejectment should be made by it, except under conditions prescribed; but it held that the regulation in question, which

[1] 5 Geo. 5, c. 8.
[2] Cf. pp. 133 ff. above.
[3] In *R.* v. *Halliday* [1917], A.C. 260, at p. 272.
[4] Cf. also Greer, J., in *Hudson's Bay Co.* v. *Maclay* (1920), 36 T.L.R. 469, at p. 476.

forbade access to the Courts, could not conceivably give security to the public or assist in the defence of the realm.[1]

Another instance is the case of requisition of rum,[2] where a regulation was issued, under the Defence of the Realm Consolidation Act, 1914, providing that Executive Departments could requisition certain classes of goods, and that, in default of agreement regarding compensation, the amount should be assessed by a Royal Commission set up by the Executive under Royal Warrant. The Royal Commission, the regulation said, was to base its assessment of compensation either on the cost of production or the purchase price, plus a reasonable rate of profit. It was not, that is to say, to be based on the market price.

By section 115 of the Army Act, 1881,[3] as amended and extended by later Acts, including the Army (Amendment) Act, 1915,[4] payment in case of requisition was to be determined by a County Court judge on the basis of market price. The Act of 1915, in fact, made elaborate provision for the assessment of market price.

Salter, J., pointed out that it was unlikely that the Act of 1914 could have authorized a basis of cost price, if in 1915 it was making careful provision for assessment of market price, and decided that the regulation was *ultra vires* in respect of its terms dealing with compensation. He remarked in his judgment:[5] "I do not think that a regulation which takes away the subject's right to a judicial decision, or transfers the adjudication of his claim without his consent from a Court of law to named arbitrators could fairly be held to be a regulation for securing the public safety or the defence of the realm. . . ."

The *Cannon Brewery Case*[6] is not dissimilar; and in both cases the principle was stressed "that an intention to take away the property of a subject, without giving

[1] *Chester* v. *Bateson* [1920], 1 K.B. 829.
[2] *Newcastle Breweries, Ltd.* v. *R.* [1920], 1 K.B. 855.
[3] 44 & 45 Vict. c. 58.
[4] 5 Geo. 5, c. 26.
[5] At p. 865.
[6] *Central Control Board* v. *Cannon Brewery, Ltd.* [1919], A.C. 744.

him a legal right to compensation for the loss of it, is not to be imputed to the Legislature, unless that intention is expressed in unequivocal terms."[1]

Cases where no Check through Judiciary on Issue of Delegated Legislation by Executive—There is a peculiar habit of the Legislature, which is possibly due to the inspiration of the Parliamentary Executive, and which, if extended, will seriously limit the capacity of the Judiciary to act as a check on the issue by the Executive of invalid subordinate legislation. Many recent Acts contain provisions that regulations, Orders in Council, and so on, the issue of which is authorized by them, shall have effect as if enacted in the Acts. For instance, the Juries Act, 1922,[2] section 6 (2), provides that "any Order in Council made under this Act may be revoked or varied by a subsequent Order so made, but, subject to such variation or revocation, shall have effect as if enacted in this Act." Many other examples could be cited, like section 29 (1) of the Ministry of Transport Act, 1919,[3] or section 16 (2) of the Gas Reguation Act, 1920.[4]

The Judiciary have been bound to give the only possible interpretation to provisions of this nature which involves an inability to declare *ultra vires* the delegated legislation in question. The point arose in the Courts as early as 1894,[5] in connection with Rules made under the Patents and Designs and Trade Marks Act, 1883,[6] section 101. Lord Herschell, L.C., observed:[7] "I own I feel very great difficulty in giving to this provision, that 'they shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act."[8] Lawrence, C.J., more

[1] *Per* Lord Atkinson at p. 752, and see cases quoted there.
[2] 12 & 13 Geo. 5, c. 11.
[3] 9 & 10 Geo. 5, c. 50.
[4] 10 & 11 Geo. 5, c. 28.
[5] *Institute of Patent Agents* v. *Lockwood* [1894], A.C. 347.
[6] 46 & 47 Vict. c. 57.
[7] At p. 360.
[8] Cf. *Baker* v. *Williams* [1898], 1 Q.B. 23, Wright, J., at p. 25.

recently,[1] on a question being raised regarding the validity of a regulation made under the Restoration of Order in Ireland Act, 1920,[2] empowering the Home Secretary to intern persons suspected of acting in manner prejudicial to the restoration of order in Ireland, remarked without qualification [3] that " the effect of section 1 (4) of the Act was to make these regulations have effect as if enacted in the Act, and it is not open to the Court to hold they are *ultra vires.*" But in another recent case,[4] Bankes, L.J., expressed a doubt whether it was in accord with the intentions of Parliament that such provisions as these should involve the disability of the subject coming to a Court of law and complaining that delegated legislation is *ultra vires.*

(*b*) *In Doing Acts in Pursuance of Delegated Legislation*—Here again the application of the Defence of the Realm Consolidation Act, 1914, which empowered the Executive to issue regulation for securing the public safety and the defence of the realm is particularly useful for illustration. Under this sub-head the validity of the act done under the regulation is for consideration, and not the validity of the regulation itself.

If the regulation gave the Executive power to do definite acts and it did other acts purporting to be in pursuance of the regulation these acts were easily declared invalid ; but, if the regulation did not over-particularize, merely giving a discretion to do acts of specified classes within the ambit of the enabling Act, it was difficult and almost impossible for the Judiciary to say that the discretion had been improperly exercised.

In *China Mutual Steam Navigation Co. Ltd.* v. *Maclay* [5] a regulation provided that steamers could be requisitioned. The Executive, purporting to act in pursuance of this

[1] *R.* v. *Inspector of Cannon Row Police Station, Ex parte Brady* (1921), 37 T.L.R. 854.
[2] 10 & 11 Geo. 5, c. 31.
[3] At p. 856.
[4] *R.* v. *Electricity Commissioners* [1924], 1 K.B. 171, at p. 191.
[5] [1918], 1 K.B. 33.

regulation, gave directions that certain steamers were to be run for the account of the Government, full earnings to be credited and net charges debited. This action, however, was held to be *ultra vires*, since the effect was to requisition not only the steamers, but also the services of the owners and their staff.

Check only Partial—On the other hand, in *Sheffield Conservative Club, Ltd.* v. *Brighten*,[1] a regulation provided that the Executive might take possession of land; and it was decided that no landowner could successfully contend that it was not necessary for his particular property to be taken, provided the authorities acted reasonably and in good faith, that is to say, "in such a way, that a Court of law could not say that they were obviously not acting *bona fide*, because they were acting so unreasonably that no honest man could say that they could possibly have so acted."[2]

Similar considerations arose in *Hudson's Bay Company* v. *Maclay*.[3] The regulation in question was to the effect that the Executive could give directions regarding the use of ships and to prohibit any British ship from going to sea without a licence. Greer, J., remarked:[4] "If the orders made by the Shipping Controller are within the powers conferred by the regulations, it does not seem to me open to challenge any particular order on the ground that it cannot reasonably be said to further the safety of the public or the defence of the realm. The issuing of orders that are within his powers must be left to the discretion of the executive officer in whom the legal powers are vested. To paraphrase Lord Reading in *R.* v. *Governor of Wormwood Scrubs Prison*, when once it is proved that the regulation is *intra vires*, this Court will not interfere or pronounce upon the question whether it was really necessary for the Shipping Controller to issue the orders in question."

It is often concluded that the system of *droit administratif* in France gives the subject in that country less pro-

[1] (1916), 85 L.J. K.B. 1669.
[2] *Per* Avory, J., at p. 1672.
[3] (1920), 36 T.L.R. 469.
[4] At p. 474.

tection against the action of the Executive than here. But it appears that nowadays the French system has so developed that not only is effective remedy available in case of executive officers acting *ultra vires*, but also in case of misapplication of power (*détournement de pouvoir*). As a result of this development the French administrative courts are in a position to check the discretionary action of the Executive, a capacity which, as has just been observed, is not open to the Judiciary in this country.[1]

4. Personal Liberty of the Subject—If the Executive exceeds the authority of the law in interfering with the personal liberty of any persons within the realm, who are under the protection of the State, the Judiciary will, on an application for a writ of habeas corpus cause the interference to cease. "The judges, therefore, are in truth, though not in name, invested with the means of hampering or supervising the whole administrative action of the Government, and of at once putting a veto upon any proceeding not authorized by the letter of the law." [2]

An outstanding example of the power wielded by the Judiciary in this respect is found in the *Art O'Brien Case* [3] where the unanimous judgment in the Court of Appeal secured the release from internment of a number of persons, who had been arrested in Great Britain and deported to Ireland by the Executive in pursuance of a regulation made by it under the Restoration of Order in Ireland Act, 1920. The Executive believed this regulation to be valid, but the Court held that it was inconsistent with an intervening Act (Irish Free State Constitution Act, 1922), under which Southern Ireland was given a status and position similar to that of Canada, that the regulation was therefore impliedly repealed, and that the order for internment was consequently invalid.

The Court felt no difficulty in granting the application

[1] Compare the position stated under head 6 (*c*), below.
[2] Dicey, "Law of the Constitution," 8th ed., p. 218.
[3] *R.* v. *Secretary of State for Home Affairs, Ex parte O'Brien* [1923], 2 K.B. 361.

for the writ, although the Executive had lost control of the body of the applicant, since there was sufficient doubt whether it had not, in view of an arrangement with the Irish Free State Government, sufficient *de facto* control.

An aspect of the case which involved the Executive in criticism in the House of Lords was the deportation following the arrest. The Government accepted in the Upper House on the 6th June, 1923, a resolution moved by Viscount Grey to the effect that the House affirmed "the long established principle of the Constitution that the Executive should not, without the previous and special authority of Parliament, exercise the power of arrest without bringing to trial by due process of law."

It has even been suggested,[1] that, in spite of an applicant being in legal custody at the moment of application, if it appears to the Court that a misuse of a power conferred on the Executive is imminent, the Court can, on an application for a writ of habeas corpus, deal with the matter. A judge of the High Court[2] delivered the following dictum: "I do not agree that if the Executive were to come to this Court and simply say, 'A person is in our custody, and therefore the writ of habeas corpus does not apply, because the custody is at the moment technically legal,' the Court would have no power to consider the matter, and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would not be sufficient, if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power." The judge then added picturesquely: "The arm of the law in this country would have grown very short, and the power of the Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves." These and similar words indicate that the Judiciary will stretch its powers of control to the fullest

[1] *R.* v. *Governor of Brixton Prison, Ex parte Sarno* [1916], 2 K.B. 742.

[2] Low, J., in *Sarno's Case, supra*, at p. 752.

extent possible in the interests of the personal liberty of the subject.

Cases where no Check through Judiciary in respect of Personal Liberty—But "above the liberty of the subject is the safety of the realm;" and the Judiciary will not and cannot intervene, where the Executive, in the exercise of its prerogative to imprison alien enemies as prisoners of war, deprives an alien enemy resident in the United Kingdom of his personal liberty on the ground that he is a person hostile to the welfare of this country. The position was thus forcibly described by Bailhache, J.:[1] The judges are "specially charged to safeguard the liberty of the subject as one of their most sacred duties. The Courts owe that duty not only to the subjects of His Majesty, but also to all persons within the realm, who are under His Majesty's protection and entitled to resort to these Courts to secure for them any rights which they may have, and this whether they are aliens or alien enemies. I think it right, therefore, to add that, deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that when the internment of an alien enemy is considered by the Executive Government charged with the protection of the realm, desirable in the interests of the safety of the realm, and the Government thereupon interns such alien enemy, the action of the Government in so doing is not open to review by the Courts of law by habeas corpus." It is in this limited sphere, therefore, that there is allowed a defence analogous to that of *acte du gouvernement*, which till recently was largely effective in exempting the French Executive from liability for illegal acts of its servants, on the plea that interference with the freedom of citizens was justified on political grounds.

Law Concerning Liberty of Subject Capable of Amendment by Ordinary Legislation—There has been a tendency

[1] In *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* [1916], 1 K.B. 268 at p. 275.

noticeable in legal argument and even in judicial pronouncements to regard the securities for personal liberty, appearing in Magna Carta and similar declarations of constitutional rights, to be so specially sacrosanct as to require some special form of amendment or repeal by the Legislature.[1] But, as Darling, J., has remarked,[2] Magna Carta has not remained untouched, "and like every other law of England, it is not condemned to that immunity from development or improvement, which was attributed to the laws of the Medes and Persians."

Consequently, when, in a case heard during the war of 1914-1918, an argument was advanced, without success, that a regulation under the Defence of the Realm Consolidation Act, 1914, section 1 (1),[3] was invalid, which empowered the Executive to order the internment of any person "of hostile origin or associations," where on the recommendation of the authorities it was deemed expedient for securing the public safety or the defence of the realm, Lord Atkinson observed:[4] "If the Legislature chooses to enact that he [the 'internee' in question] can be deprived of his liberty and incarcerated and interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires*, do not infringe upon the Habeas Corpus Acts in any way whatever, or take away rights conferred by Magna Carta, for the simple reason that the Act and these orders become part of the law of the land. If it were otherwise, then every statute and every *intra vires* rule or bye-law, having the force of law, creating a new offence, for which imprisonment could be inflicted, would amount, *pro tanto*, to a repeal of the Habeas Corpus Acts or of Magna Carta quite as much as does this Statute of November, 27th, 1914, and the regulations validly made under it. . . ."

[1] Cf. *Chester* v. *Bateson* [1920], 1 K.B. 829, and Lord Shaw, in *R.* v. *Halliday* [1917], A.C. 260.

[2] In *Chester* v. *Bateson*, *supra*, at p. 832.

[3] Which conferred on the Executive power during the War "to issue regulations for securing the public safety and the defence of the realm."

[4] *R.* v. *Halliday* [1917], A.C. 260, at p. 272.

5. Taxation—The constitutional principle that the Executive cannot impose direct or indirect pecuniary charge or tax on subjects without Parliamentary sanction was affirmed in the Bill of Rights, 1688:[1] "Levying money to the use of the Crown by pretence of prerogative without grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal."

The Judiciary is as strenuous in upholding this principle as it is that of the liberty of the subject; and in one respect it is easier to do so, since it is hardly possible for the Executive to allege, whatever the circumstances, that the discretionary imposition of a tax is necessary for securing the public safety or the defence of the realm. The Courts, in construing any statute, the terms of which are alleged by the Executive to confer power to impose taxation, require the intention to derogate from the Bill of Rights to be expressed in very clear language.

The modern leading case on this subject is *Attorney-General* v. *Wilts United Dairies*.[2] In this case the Executive, which had been empowered by statute[3] to regulate the supply and consumption of food during the war, and which had issued regulations of this nature under the Defence of the Realm Consolidation Act, 1914, section 1 (1), prohibited milk-dealers from buying milk in one area of England for export to another area, except under licence. The Executive imposed a charge of twopence a gallon, as a condition of granting a licence. It was decided by the Court of Appeal, and its decision was affirmed in the House of Lords, that the charge was a levying of money for the use of the Crown without the authority of Parliament, and that its imposition was *ultra vires* and illegal; and this, although the arrangement for the payment of the charge was in the form of an agreement.

Scrutton, L.J., in the Court of Appeal[4] expressed the view that excessive claims by the Executive without grant

[1] 1 Will. & M. (session 2), c. 2.
[2] [1921], 37 T.L.R. 884 (C.A.), 91 L.J. K.B. 897 (H. of L.).
[3] New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68), sect. 4.
[4] At p. 886.

of Parliament are "at the present time quite as dangerous, and require as careful consideration and restriction from the Courts of Justice" as at the time of the Bill of Rights, although the political position of the Executive in relation to the people at the earlier date differed radically from that of the present day. Atkin, L.J.,[1] thought that "the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges on the subject."

An argument raised by the Solicitor-General on behalf of the Executive, to the effect that a charge was being imposed in respect of something to which the subject was not entitled. This argument was expressly discountenanced in the Court of Appeal, where it was suggested that the Executive could not justify a charge by making a prohibition under delegated powers and then selling the right to evade the prohibition.[2]

6. Exercise of Judicial or Quasi-Judicial Functions—It has been noticed in discussing the functions of the Executive in Chapter III that Departments of the Executive or parts of them exercise judicial or quasi-judicial functions. The Judiciary are able, by means of three so-called "prerogative writs," to maintain control over the exercise of these functions.

(*a*) The writ of prohibition forbids a body acting judicially to proceed in excess of jurisdiction or in contravention of the law.

(*b*) The writ of certiorari requires the record of the proceedings of a body acting judicially or quasi-judicially to be transmitted to the superior Court, so that an order may be made in respect of any irregularity.

(*c*) The writ of mandamus is a positive order to a body acting judicially or quasi-judicially.

[1] At p. 886.

[2] The War Charges (Validity) Act, 1925 (15 Geo. 5, c. 6) was subsequently passed to regularize charges of this character.

In practice these writs have only occasionally been issued by the Judiciary to parts of the Executive. But the existence of the method of check requires notice, since it is probable that, with the extension of the innovation of creating Executive 'tribunals,' the applicability of the writs will become a matter of growing interest.

(*a*) **Prohibition**—The following dictum of Brett, L.J.,[1] which was quoted with approval recently in the Court of Appeal,[2] well expresses the attitude of the Courts: "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that whenever the Legislature entrusts to any body of persons, other than to the superior Courts, the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

To Whom Addressed—Writs of prohibition have been issued to the Light Railway Commissioners and to the Comptroller-General of Patents; but, on an attempt[3] to prohibit the Attorney-General in respect of his duties of hearing appeals in patent matters,[4] it was decided by the Court of Appeal that prohibition would not lie, on the ground that, although the functions were judicial, the Attorney-General is not a Court. In fact the proposal that the scope of the writ should cover the head of the English Bar rather shocked the Court, one member of which regarded it as "contrary to principle and contrary to practice."

In What Cases—The nature of the act, rather than the nature of the tribunal, was considered in respect of an inquiry into the affairs of a company by an inspector appointed by the Board of Trade under the Companies

[1] In *R.* v. *Local Government Board* (1882), 10 Q.B.D. 309, at p. 321.
[2] *R.* v. *Electricity Commissioners* [1924], 1 K.B. 171, at p. 209.
[3] *In re Van Gelder's Patent* (1888), 6 R.P.C. 22.
[4] See p. 130 above.

Act.[1] The inspector in his examination of the affairs of the company was able to insist on the production of documents and the taking of evidence on oath; but it was decided that the act was not sufficiently judicial to enable prohibition to lie, since the inquiry was for the purpose of making a report to the Board of Trade, which could only be used as evidence of the opinion of the inspector.

The Electricity Commissioners, however, who exercise their functions under the supervision of an Executive Department, have been held to be acting with sufficient judicial quality in formulating schemes under the Electricity (Supply) Act, 1919,[2] whereby, after holding local inquiries, they provided for the incorporation of joint electricity authorities. These schemes involved decisions affecting the rights and liabilities of electricity companies.[3]

There was included in the same case a consideration of further interesting points in connection with prohibition. The statute in question provided that on formulating a scheme the Commissioners could make an order which, after confirmation by the Minister of Transport, should only become operative when approved by Parliament. On approval it was to have effect as if enacted in the Act. It was argued that the application for prohibition was premature, since, although the scheme had been formulated, no order had been made. The Court did not accept that it could be placed in the position of either being too early, because the scheme was subject to confirmation or approval, or too late, because Parliament had approved it, and the order had effect as if enacted in the enabling Act. The Court accordingly held that a proceeding could be a judicial proceeding although subject to confirmation and approval.

A case, which will call for notice in discussing certiorari[4]

[1] *In re Grosvenor, etc., Hotel Co. Ltd.* (1897), 13 T.L.R. 309.

[2] 9 & 10 Geo. 5, c. 100.

[3] *R.* v. *Electricity Commissioners* [1924], 1 K.B. 171, and see *per* Bankes, L.J., at p. 198.

[4] *R.* v. *Hastings Local Board* (1865), 6 B. & S. 401.

was cited in opposition to the issue of the writ. This case decided that a prerogative writ will not issue in respect of the action of an Executive Department in the making of a Provisional Order. It was distinguished on the grounds that in the case of a Provisional Order the Department does something which is usually effected by a Select Committee of the House of Commons on private Bills, and that the Act authorizing the making of the Provisional Order in question expressly provided that it should be of no validity until confirmed.

It was further argued on behalf of the Commissioners that there could be no control by the Courts since the Legislature had itself retained a power of control by providing for the necessity of its approval before orders became operative. The Court decided that the reservation of control by the Legislature did not exclude the power of the Courts to issue prohibition.

In considering the type of body to which a writ of prohibition can be directed, Bankes. L.J., observed : [1] " Originally, no doubt, the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word 'Court.' As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies."

(*b*) **Certiorari**—It has been said by Fletcher Moulton, L.J.,[2] that the procedure of certiorari applies in many cases in which the body, whose acts are criticized, would not ordinarily be called a Court, and where it acts would not be ordinarily termed judicial acts so long as they were not merely 'ministerial.' It will be seen that mandamus will not be issued in the case of an exercise of a 'discretion.' The area of applicability of these prerogative writs is a matter of considerable uncertainty, since the principles at present laid down are couched in indeterminate phraseology.

[1] At p. 193.

[2] *R.* v. *Woodhouse* [1906], 2 K.B. 501, at p. 535, quoted in *R.* v. *Electricity Commissioners*, *supra*, by Atkin, L.J.

To Whom Addressed—Writs of certiorari have been ordered to be issued to bodies, such as the Board of Education, though not Courts in the usual sense. In a case [1] in which the Board of Education was, under statute, empowered to determine certain questions concerning the legal liabilities of local education authorities to managers of schools, on questions being put to the Board, they purported to give a decision which failed to deal with the matters in issue. It was held that the decision must be quashed by certiorari, and a mandamus must issue commanding the Board to determine the questions.

In What Cases—With regard to the nature of the Act in respect of which the writ will be issued, dicta of members of the House of Lords in *Local Government Board* v. *Arlidge*,[2] a case which was considered above in connection with the nature of the functions of the Executive,[3] provide a useful indication of the limits of applicability.

Lord Parmoor observed: [4] "The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts or orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties." But Lord Moulton recorded the following cautionary words: "I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a Department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued; and I, therefore, assume in favour of the respondent that the procedure he adopted was correct."

As in the case of prohibition so in the case of certiorari, the intervention of the Legislature as a possible cause of the incapacity of the Judiciary to issue the writ must be regarded. It has been decided that a Provisional Order made

[1] *Board of Education* v. *Rice* [1911], A.C. 179.
[2] [1915], A.C. 120. [3] P. 42. [4] At p. 140.

by a Government Department under statute, which required confirmation by the Legislature in the normal manner, cannot be the subject of a writ of certiorari.[1] Two of the members of the Court rested their judgments solely on the ground that it would be improper to interfere with an Order which required confirmation by Parliament. Further grounds were that the Provisional Order had no effect until confirmed, that, if made without jurisdiction, the Select Committee adjudicating on the Confirmation Bill would reject it, that the Provisional Order was not a judicial determination such as would justify the Court in quashing it, and that, even if the Government Department in making the Order overstepped its authority, there was nothing in the relevant statute to enable the Court to act.

(*c*) **Mandamus. To Whom Addressed**—An instance of the issue of the writ of mandamus to the Board of Education was cited in the preceding sub-heading. This is one of a very limited number of cases where the writ has been issued to Government Departments or Executive officers.

The generally accepted rule of law is to the effect that, although the writ may issue against individual members of the Executive in respect of matters in which they owe a legal duty to a subject as distinct from that which they owe to the Crown, it will not issue against the Crown itself, or presumably to a Minister of the Crown as such and representing the Crown. In the earlier cases the Courts adopted the attitude that they could not issue commands to the Sovereign; and this attitude has persisted in recent decisions. In 1836,[2] Littledale, J., observed: "The goods are in the hands of officers of the Crown: a mandamus in this case would be like a mandamus to the Crown, which we cannot grant." Again, in 1872,[3] Cockburn, C.J., said: "This Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. . . ." And in

[1] *R.* v. *Hastings Local Board* (1865), 6 B. & S. 401.
[2] *R.* v. *Commissioners of Customs* (1836), 5 A. & E. 380.
[3] *R.* v. *Lords Commissioners of Treasury* (1872), L.R.7, Q.B. 387.

a still later case,[1] Lord Esher, M.R., pointed out that, not only would a mandamus not lie against the Crown, but that it will not lie against a Department of the Executive where it is acting in a capacity in which it is responsible to the Crown and has no legal duty imposed on it towards the subject.

In What Cases—This writ will only be issued where there is no other specific remedy, such as, for instance, an action in tort against an executive officer personally. It will not be available when there is involved in the duties in question the exercise of a discretion. On the other hand, it has been issued in cases in which the judicial character is less marked than in cases in which prohibition or certiorari would be available.

There are seen here some relics of the days when the King was, in fact, the Executive. The legal position in regard to the issue of this writ, as indeed in respect of all three ' prerogative writs ' is far from clear.[2]

7. Administration of the Fighting Forces—To some extent the Judiciary's means of control in respect of the legal rights and duties of persons serving in the fighting forces is limited. The members of those forces are subject to a special code of law, and in so far as matters affecting them fall within the limits of that code, they are not able to appeal to the ordinary Courts of law. At the same time, although there is in the ordinary sense no right of appeal given against decisions of courts-martial or against the awards or orders of officers, if a court-martial or an officer act without authority or exceed its jurisdiction, its action will be supervised by the Judiciary. In the cases, for instance, of a court-martial punishing where there is no power to punish, or of an officer inflicting a heavier punishment than that authorized, the Courts of law may exercise their civil jurisdiction by writs of prohibition or certiorari or through actions against individual

[1] *R.* v. *Secretary of State for War* [1891], 2 Q.B. 326.

[2] For a fuller discussion of the writ of mandamus, see the present writer's book, " The Civil Servant in the Law and the Constitution," pp. 73-8.

officers, as may be fitting; or criminal proceedings may be instituted in the form of indictment for assault, and so on.

A principle was established in 1786, in the famous case of *Sutton* v. *Johnstone*,[1] that a Civil Court would not interfere, where the exercise of military discipline was concerned. In the light of later decisions, and especially that of *Heddon* v. *Evans*,[2] it is now clear that a military officer is liable to an action for damages, if in excess of his jurisdiction he commits an act which amounts to false imprisonment or other common law wrong, even though he purports to act in the course of military discipline. But if an action is brought in the ordinary Courts merely in respect of alleged infringement of rights acquired under the special code of service law, for instance, questions of rank, or emoluments, there is no remedy in those Courts.

It should be added that it is for the ordinary Courts to determine whether a person is or is not "a person subject to military law." "Enlistment, which constitutes the contract by which a person becomes subject to military law, is a civil proceeding, and a Civil Court may sometimes have to inquire whether a man has been duly enlisted or whether he is or is not entitled to his discharge."[3]

8. State of War—When and where a state of war, or of insurrection, riot or rebellion amounting to war, exists, the Judiciary's capacity of controlling the action of the Executive in its military activities lapses. The ordinary law of the land temporarily ceases to have its full force and gives way to what is known as martial law (which has recently been described by a judge as "no law at all.") The fact that for some purposes civil tribunals are permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that there is not in fact a "State of War."[4]

"Doubtless cases of difficulty arise when the fact of a

[1] (1786-7), 1 T.R. 493, 784. [2] (1919), 35 T.L.R. 642.
[3] See Dicey, "Law of the Constitution," 8th ed., pp. 303-4, and authorities quoted there.
[4] *Ex parte Marais* [1902], A.C. 109.

state of rebellion or insurrection is not clearly established . . . . but once let the fact of actual war be established and there is an universal consensus of opinion that the Civil Courts have no jurisdiction to call in question the propriety of the action of the military authorities." [1]

It would appear at first sight that the question, whether or not there is a state of war in a particular place at a particular time, must depend on the word of the Executive. This is not, however, altogether certain. It was recently decided in the Irish Courts that the Civil Courts are bound, when their jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion.[2]

When the disorder giving rise to a state of war ceases, the special powers of the Executive cease, and the normal powers of the Civil Courts are *ipso facto* resumed.[3]

It is convenient to note here that the capacity of the Executive to declare that some part of an enemy's country is not hostile, or to grant licences to trade with hostile ports, can render valid or legal actions which otherwise would be held by the Courts to be invalid or illegal. For instance, a marine insurance in respect of a ship trading with an enemy port is invalid, but, if the Executive declare any port in the colonial or other possessions of an enemy not to be hostile, by Order in Council, proclamation, or other act of supreme authority, insurances in respect of a ship trading with such a port will be held by the Courts to be valid.[4] Again the Executive can render legal transactions with an enemy by granting subjects the privilege or licence to trade with the enemy or to hostile ports.[5]

It is only in exceptional cases that a check can be applied through the Judiciary on tortious acts of the Executive, for instance, in the case of the Minister of Transport; [6]

[1] *Per* Lord Halsbury, in *Ex parte Marais*, *supra*, at p. 115.
[2] *R.* v. *Military Governor of Military Internment Camp* [1924], 1 I.R. 32.
[3] *Wolfe Tone's Case* (1798), 27 St. Tr. 613, 625.
[4] See *Blackburn* v. *Thompson* (1811), 3 Camp. 61.
[5] Cf. *Robinson* v. *Touray* (1813), 1 M. & S. 217.
[6] Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), sect. 26 (1).

but there is an indirect check, since actions in tort may be brought against Executive officers personally in respect of acts done in a public capacity; and it is the general practice of the Executive to stand behind these officers financially whether judgment is given in their favour or not.[1]

In few foreign countries are the Executive and Executive officers subject to check by the ordinary Courts of law, as they are, in effect, in this country. In the United States of America it was at one time ruled that no claim in contract or quasi-contract could be brought against the Executive in the ordinary Courts, since, among other reasons, that organ had not control of the national purse-strings. It was necessary to petition the Legislature for redress. But later there was set up a Court of Claims, a Court distinct and separate from the ordinary Courts, to give effective decisions concerning these claims against the Executive. And in France the Executive officer cannot be proceeded against in the ordinary Courts in respect of acts done in pursuance of his duty (*fautes de service*), but only in respect of personal faults (*fautes personnelles*). It is, in fact, now established in France that all suits arising in connection with the operation of a public service, whether based on the act of the State, the act of an Executive Department or the act of an Executive officer, are to be decided in the administrative Courts, largely composed of Executive officers. It should be realized, however, that *droit administratif* has to a great extent ceased to be suspected by the French private citizen; and the movements aiming at the suppression of administrative jurisdiction are dying down. It is very generally accepted that *droit administratif* provides in practice a high degree of protection against arbitrary action on the part of the Executive.

[1] The question of the Executive officers' liability in tort is fully discussed in chap. v. of the present writer's book on "The Civil Servant in the Law and the Constitution."

CHAPTER IX

INTERRELATIONS OF LEGISLATURE AND JUDICIARY

Generally—It has been seen that, in so far as their tenure of office is concerned, members of the Judiciary are independent of the Executive, and can only be removed by the Legislature on an address by both Houses, and this power of removal will only be exercised in cases where an offence has been committed or, at least, some act of moral delinquency done.[1]

In exercising its functions the Judiciary has the advantage of the organ which speaks last, since it applies the law to concrete facts.[2] On the other hand, if the Legislature disapprove of a legal decision in the Courts, for example, the interpretation of a statute, it can at any time pass another statute, so as to prevent the decision acting as a precedent. In 1901, for instance, the House of Lords (as final Court of Appeal) decided that a trade union, though not a corporate body, could be sued in an action of tort for the wrongful acts of its officials.[3] The Legislature, however, did not desire that the law should stand thus. It accordingly enacted [4] that an action against a trade union in respect of any tortious act alleged to have been committed by it or on its behalf should not be entertained in any Court.

What was, perhaps, a more remarkable example was recently provided in connection with requisitions of land under the Defence of the Realm Acts during the war of 1914-1918. It was held by the House of Lords in 1920 in the

[1] See p. 126 above. [2] See p. 54.

[3] *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [1901], A.C. 426.

[4] By sect. 4 of the Trades Disputes Act, 1906 (6 Ed. 7, c. 47).

De Keyser Case [1] that the contention of the Executive, advanced during the earlier years of the war, that there was no legal liability to pay compensation in respect of requisition of land for the defence of the realm during the war, was not capable of being sustained. The Legislature thereupon, in the terms of sections 1 and 2 of the Indemnity Act, 1920,[2] included provision that no legal proceedings could be instituted in respect of requisition of land of the class above mentioned, but that payment or compensation for requisition should be assessed by a special tribunal set up under the Act. A peculiar feature of this example is the provision, in section 1 of the Act, that any legal proceedings, the taking of which was restricted by the Act, should, if instituted either before or after the passing of the Act, be discharged and made void.

If it were not, therefore, that the Legislature were accepted as the supreme law-maker, the relations between the organs might devolve into a contest in which neither side could gain final success.

But there is, it seems, emerging a constitutional convention, necessary to the proper exercise of the Judiciary's function, that the Legislature will not interfere with any matter which is *sub judice*. It is accepted, too, that the passing of *ex post facto* legislation may be embarrassing to the Judiciary, since, in the result, it may be forced to decide that that which was legal, when done, is illegal, or vice versa. This has been appreciated by framers of foreign Constitutions. The Constitution of Mexico, for example, provides (Art. 14) that "no law shall be given retroactive effect to the prejudice of any person."

There is no special machinery provided for inquiry by the Legislature into the administration of justice by the Judiciary. But, if necessity arises, the appropriate method appears to be the appointment of a Committee of Inquiry, after the analogy of inquiry into the governmental operations of the Executive. An early example of the

[1] *Attorney-General* v. *De Keyser's Hotel, Ltd.* [1920], A.C. 508.

[2] 10 & 11 Geo. 5, c. 48. Cf. War Charges (Validity) Act, 1925 (15 Geo. 5, c. 6).

adoption of this method was the appointment of a Committee of the House of Commons in 1620, during the exercise by Francis Bacon, Lord Verulam, of the office of Lord Chancellor, to inquire into "the abuses of Courts of Justice." More lately a Committee of Inquiry was appointed by the Legislature, in 1864, to investigate the administration of justice in the Bankruptcy Court. In the Constitution of the German Commonwealth express provision is made for the institution by the Legislature of Committees of Inquiry, not only into the activities of the Executive, but also of the Judiciary.[1]

Judiciary's Intervention in respect of Private Acts—Although the Judiciary has never attempted to interfere with the function of the Legislature in enacting Public Acts of Parliament, the proceedings leading up to the passage of Private Acts are, as has been seen, so much akin to judicial proceedings and are so far concerned with private property and interests that the Courts will restrain parties by injunction from petitioning one of the Houses for leave to bring in a Private Bill. But the Courts will not interfere once a Private Bill is received by the Legislature, and is before it.

Petitioners for leave to bring in a Private Bill have been restrained on the ground that the object of the Bill was to set aside a covenant, or to evade the provisions of a statute.[2]

In a case where it was sought to restrain a petitioner against a Private Bill, Cottenham, L.C., remarked:[3] "There is no question whatever about the jurisdiction. A party who comes to oppose a railway Bill in Parliament, does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to Parliament. He is not even allowed to be heard as a petitioner against the Bill, unless he has a *locus standi* in respect of some pro-

[1] See p. 89.

[2] *Heathcote* v. *North Staffordshire Railway* (1850), 6 R. & C. Cases, 358.

[3] *Stockton, etc., Railway Co.* v. *Leeds, etc., Cos.* (1848), 5 R. & C. Cases, 691, at p. 696.

perty or interest liable to be affected by it, if it should pass into law. This Court, therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a Bill in Parliament, as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims."

But in another case before the same judge,[1] it was decided that the Court could not restrain petitioners when they had obtained their leave and when the Bill had been introduced into the House of Commons; and this even though the petitioners for leave had broken their faith in acting as they did, in view of undertakings given in a pending action in the Courts.

The refusal of the Judiciary to quash a Provisional Order, on the grounds that it had no effect until converted into law, and that in the process it would receive the consideration of the Legislature, was mentioned in the preceding chapter;[2] so, too, was the issue by the Court of a writ of prohibition in respect of the formulation of a scheme by the Electricity Commissioners, which, if and when embodied in an Order, required the approval of Parliament.[3]

Checks by Legislature on Judiciary in respect of Subordinate Legislation—The Legislature has delegated to the Judiciary powers of subordinate legislation in respect of matters of practice, procedure, and the like;[4] and, just as steps to control the exercise of delegated powers are taken by the Legislature in the case of the issue of delegated legislation by the Executive, so the Legislature in the statutes delegating powers to the Judiciary, provides for an opportunity of reviewing, and, if necessary, annulling subordinate legislation. For instance, the Rules of Court issued by the Rule Committee under the Judicature Acts must be laid before Parliament, which reserves power to annul them.

[1] *Attorney-General* v. *Manchester, etc., Railway Co.* (1838), 1 R. & C. Cases, 436.

[2] P. 159. [3] P. 156. [4] See p. 78.

Checks on Legislature through Judiciary—The capacity of the Judiciary to act as a check or controlling force in respect of the exercise by the Legislature of its functions exists chiefly in the realm of Parliamentary privilege. The day is almost forgotten when Coke claimed that the judges might hold a statute void, either because it was against reason and natural law, or because it trenched on the royal prerogative; and the Judiciary cannot in this country, as in countries with written Constitutions, declare an Act of the Legislature to be unconstitutional. This does not mean, in theory, that the powers of the judges here are less than those of the judges, say, in the United States of America. In both countries the judges merely interpret the laws; but, where there is a written Constitution, the effect of interpreting that Constitution may result in a declaration of invalidity in respect of laws passed by the Legislature, the latter being of a lower degree of authority than the laws written in the Constitution itself.[1]

Privileges Claimed by Legislature—The privileges of the Legislature or its right to be untrammelled by the ordinary law of the land in matters relating to its own proceedings are of long standing, and are based historically on the Legislature being a Court of Judicature, and practically on the necessity of its being, as it were, an *imperium in imperio*, a body entirely independent in so far as its own internal discipline and proceedings are concerned.[2]

These privileges cannot be better described than in the words, not of the Legislature, but of members of the Judiciary in *Bradlaugh* v. *Gosset*.[3]

Lord Coleridge, C.J., remarked at page 275: "What is said or done within the walls of Parliament cannot be inquired into in a Court of law. . . . The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive." And Stephen,

[1] Cf. Marriott, "Political Institutions," p. 293, quoting Lord Bryce.

[2] Cf. the exclusive sphere of the Executive in matters of military discipline, p. 160 above.

[3] (1884), 12 Q.B.D. 271.

J., added to this :[1] "I think that the House of Commons is not subject to the control of His Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings." The jurisdiction may extend, in respect of matters of discipline (contempt), not only over members of the Houses, but over persons who are not members.

Occasions for Collision between Legislature and Judiciary—The Legislature has claimed that it is sole judge of the extent of its privileges; but the Judiciary has on various occasions insisted that it has jurisdiction to decide cases where, in its opinion, the decision would not involve an encroachment on the Legislature's privilege of jurisdiction over its own internal proceedings. "It seems now to be clearly settled that the Courts will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance."[2]

The two most noted cases which illustrate the possibility of collision between the two organs are *Ashby* v. *White*,[3] and *Stockdale* v. *Hansard*.[4] In the former case an elector brought an action, before the Court of Queen's Bench, against a returning officer for refusing to allow him to vote. The Legislature thought that this was a matter of internal discipline, being connected with its right to determine disputed returns. An actual collision between the Legislature and the Judiciary was avoided by prorogation. In the latter case a libel action was brought, and a decision given in respect of words in a publication ordered by Parliament. Again the Legislature thought that this concerned its own proceedings; and it accordingly passed a statute dealing with this particular class of case.[5]

Resolutions of the Houses and the Law of the Land—Apart from Parliamentary privilege the Courts will not

[1] At p. 278.
[2] Anson, "Law and Custom of the Constitution," vol. i, p. 196.
[3] (1702), 1 Sm. L.C. (12th ed.), 266.
[4] (1839), 9 A. & E. 1.
[5] Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9).

accept as a defence the provisions of a Resolution of one House of the Legislature; but, if one of the Houses, in connection with its internal proceedings passes a Resolution that a member may not do a thing, which by the general law he has a right to do, the Courts will not inquire into the propriety of that Resolution. This statement represents the main effect of the case of *Bradlaugh* v. *Gossett*,[1] a case which throws considerable light on this difficult branch of Constitutional law.

Bradlaugh was by the general law entitled to take the oath prescribed by the Parliamentary Oaths Act, 1866;[2] and he brought an action against the Sergeant-at-Arms of the House of Commons to obtain an injunction to restrain him from using force to prevent him (Bradlaugh) from entering the House to take his seat, although the House had passed a Resolution to the contrary. The action did not succeed, since the Court held that the order under which the Sergeant acted related to the internal management of the procedure of the House. Stephen, J., affirmed the principle that the Legislature cannot be controlled in its interpretation of statutes, "so far as the regulations of its own proceedings within its own walls are concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly." He made, however, a significant distinction, when he pointed out that, if the House had resolved that a member should be free from penalties for which he had become liable owing to a non-compliance with the Act in question, the Courts would disregard that Resolution; and he doubted whether the control of the Courts could in any case be excluded in respect of a criminal act committed in one of the Houses.

The principle, that a Resolution of one House of the Legislature cannot change the law of the land unless authorized by the Legislature to do so, was accepted in *Burdett*

[1] *Supra.*
[2] 29 Vict. c. 19.

v. *Abbott*,[1] *Stockdale* v. *Hansard*,[2] and *Bradlaugh* v. *Gossett*,[3] and was confirmed in a more recent case of *Bowles* v. *Bank of England*,[4] where it was decided that a Resolution by the Committee of the House of Commons for Ways and Means, assenting to income-tax at a certain rate for an ensuing year, did not, either *per se* or after adoption by the House of Commons, authorize the Executive to levy on the subject the tax so assented to, before it had been actually imposed by Act of Parliament.

Legislature's Right to Commit—A definite and clearly ascertained privilege of the Legislature, which cannot be controlled by the Judiciary, is the right to commit persons (members or others), where either House adjudges that any act is a breach of privilege and contempt. The extent of the powers of punishment have been mentioned in an earlier chapter.[5]

The leading authority in this matter, in so far as the House of Commons is concerned, is *Burdett* v. *Abbott*.[6] This was an action of trespass, brought against the Speaker of the House, for breaking into the plaintiff's dwelling, arresting him and imprisoning him in the Tower of London. The action failed on the ground that the House had resolved that the plaintiff had been guilty of breach of privilege in authorizing the printing of a letter reflecting on the just rights and privileges of the House. Bayley, J., remarked:[7] "If, then, the House be a Court of Judicature, it must . . . have the power of supporting its own dignity as essential to itself; and, without the power of commitment for contempts, it could not support its dignity." Lord Ellenborough, however, suggested that there might be cases in which the Courts could inquire into the grounds for commitment. He said: "If a commitment appeared to be for contempt of the House of Commons generally, I would, neither in the case of that Court nor of any other of the Superior Courts, inquire further; but, if it did not

[1] (1811), 14 East 1.
[2] *Supra*.
[3] *Supra*.
[4] [1913], 1 Ch. 57.
[5] P. 51.
[6] *Supra*.
[7] At p. 159.

profess to commit for contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably arbitrary, unjust, and contrary to every principle of natural justice, I say that, in case of such a commitment, we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded." This is reminiscent of the Judiciary's attitude towards the Executive.

Other privileges which give protection to individual members, freedom from arrest (except for treason, felony, or refusal to give security for the peace), and immunity from liability to legal proceedings in respect of acts done in the transaction of Parliamentary business, require but bare mention.

The Courts, it may be added, will not entertain a plea that a member is liable for refusing to present a petition on behalf of a plaintiff; nor will they require members to give evidence in respect of proceedings in the House of Commons without the permission of the House, unless the members desire to do so.[1]

Legislature's Suspicion of Judiciary—The risk of collision between the Legislature and the Judiciary appears to grow less, partly, no doubt, because the legal position has become more clear, as a result of decisions in the Courts. But Sir Erskine May[2] has expressed the view that the position of Parliamentary privilege is unsatisfactory and that the plea of privilege should be replaced by statutory provisions, so that actions against officers of the Legislature may be stayed, thus avoiding embarrassment and undue expense.

There are, however, evidences that the Legislature retains suspicions that the Judiciary may encroach upon what it regards as its proper province. The Parliament Act, 1911,[3] modified the interrelations of the two Houses, and provided

[1] *Chubb* v. *Salomans* (1850), 3 Car. & Kir. 75.
[2] "Parliamentary Practice," 12th ed., p. 138.
[3] 1 & 2 Geo. 5, c. 13.

that in dealing with Money Bills the capacity of the Upper House should be limited. It provided, too, that the Speaker of the House of Commons should certify Bills to be Money Bills, and to give other certificates. As a precautionary measure, it was enacted, in section 3, that " any certificate of the Speaker of the House of Commons, given under this Act, shall be conclusive for all purposes and shall not be questioned in any Court of law."

Judiciary's Suspicion of Legislature—It remains to observe that the Judiciary, also, is jealous of its jurisdiction; and in construing statutes, it follows the principle that the intention of the Legislature to remove or restrict the jurisdiction of a Superior Court will only be inferred, if clear and express terms are used.[1]

[1] Cf. *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at p. 500, *Oram* v. *Breary* (1877), 2 Ex. D. 346, at p. 348, and *Newcastle Breweries, Ltd.* v. *R.* [1920], 1 K.B. 855, the last quoted on p. 145 above.

CHAPTER X

CONCLUSIONS

Balance in Working of Constitutional Machinery—In an early stage in the political development of some States there has been found a generic and rudimentary governmental organ. In certain city states of Ancient Greece this organ consisted of assemblies of the people, who acted as Executive, Legislature, and Judiciary. But this was a rare phenomenon, rendered possible by special conditions. Usually this organ did not govern on behalf of the people, but on behalf of itself. The Government governed for its own sake.

Since, however, there has been evolved in this country an Executive, which obtains its mandate through a representative Legislature, and since there has developed an independent Judiciary, these three derivative organs, by a process of reciprocal interaction, together tend to provide a balanced machinery of government. Their interrelations go far towards producing an equipoise, protecting the people against arbitrary action. "The powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectively checked and restrained by the others." Thus the ideal was propounded by one of the earliest statesmen of the United States of America.[1]

The notion of a "balance of powers," to be attained by mutual control between separate organs of government is as old as Polybius; and it must be distinguished from the balance contemplated by such writers as Lord Brougham,[2] who discussed the effect of a compound of the three recog-

[1] Jefferson, "Notes on Virginia," chap. xiii.
[2] See his "British Constitution," chap. i.

nized simple forms of government, monarchy, aristocracy, and democracy. Blackstone's principle of balance, too, took effect, it seems, not so much in respect of the three organs of government as the three parts of the Legislature.[1]

It should be emphasized that the suspicion cast on the expression "checks and balances" in the minds of constitutional lawyers is, to some extent, due to the observation of too uniform, symmetrical, and rigid applications of checks between organs of government, and to the unnecessary implication that where checks operate there can be no collaborative action. But a properly developed system of mutual checks may well constitute part of the means to assist the unimpeachable object of the balanced working of the Constitution. The adverse criticisms which have been levelled at theories of constitutional checks and balances seem largely to follow from a confusion of the theory of balance between the three simple forms of government with the theory of checks and balances by and between the organs of government. James Mill, for instance, in his article on "Government," apparently confused the two. He remarked that "in this doctrine of the mixture of the simple forms of government is included the celebrated theory of balance among the component parts of a Government." His characterization of the former as deserving the epithets "wild, visionary, chimerical" are accepted without difficulty. But he supplied no adequate reason for a universal condemnation of the latter. He merely inquired rhetorically: "If there are three powers, how is it possible to prevent two of them from combining to swallow up the third?" It is hoped that this book contains material for an answer to this question.

But there is another indictment of the theory of checks and balances which must be noticed. It was forcibly expressed by the late President Wilson[2] as follows: "The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the

[1] "Commentaries," 21st ed., pp. 153-4.
[2] "The New Freedom," pp. 43, 44.

universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its function by the sheer pressure of life. No living thing can have its organs offset against each other, as checks, and live." It is more than doubtful if this conclusion is one which would be accepted by a majority of scientists, since the inter-action of organs cannot be confined to a process of mutual check. Moreover, the State can only be regarded as an organism by way of analogy. Perhaps, then, President Wilson was mistaken in thinking that the theory was inconsistent with the evolutionary development of Constitutions, as well as in suggesting that it involves a negation of co-operation between organs of government.

Balance in the machinery of government is attained, not merely by the introduction of a system of mutual checks or controls between the different organs, Executive, Legislature, and Judiciary, but also by the allowance to each organ, and especially to the Judiciary, of a measure of independence of action; and, as between the Legislature and the Executive, there are manifest advantages in an actual collaboration. The close relations of these two organs prevent the necessity of an over-elaborate and rigorous system of checks, which is liable to result in collision and deadlock.

It has been seen (Chap. II) that in some cases members of one organ are also members of another. This is due either to incomplete separation, as in the case of the Legislature and the Judiciary, or to partial fusion subsequent to separation, as in the case of the Executive and the Legislature. It was seen, too, that on a fairly complete separation of the organs of the British Constitution the Executive especially (e.g. in respect of legislation for Overseas Dominions), and the Legislature, to a lesser degree (e.g. in Acts of Parliament of an executive nature), have retained functions corresponding to the office of another organ. They could not throw off the habits acquired in the days when they were parts of a single organ of government. This failure system-

atically to differentiate or rather to divide the functions has been followed at a much later stage by a practice of conferring on organs the power of exercising functions other than those corresponding to their nature; and this practice is attributable chiefly to complexity and specialization of government (e.g. delegation of legislative power to the Executive, or the entrusting the Executive with judicial functions).

Doctrine of "Separation of Powers"—There is, then, a considerable risk, in dealing with this aspect of Constitutional Law, of confusion between separation of organs and differentiation or division of functions. Interpretations of the doctrine of the "separation of powers," so far from throwing a clear light on constitutional relations, must be blamed for being at the root of much of the confusion which exists. They are also accountable for certain fundamental principles adopted in the Constitutions of France and the United States of America. It is desirable for these reasons, as well as for the reason that the doctrine originated in observations of the British Constitution, to note shortly what was the theory advanced by Montesquieu, and what followed from it.

Montesquieu — Montesquieu's "L'Esprit des Lois" (Book XI, Chap. VI), published in 1748, contains the expression of his theory of the separation of powers. The most relevant passage is this:[1] "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

[1] Nugent's translation.

"There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, or of trying the causes of individuals.

"Most Kingdoms in Europe enjoy a moderate government, because the prince, who is invested with the first two powers, leaves the third to his subjects. In Turkey, where these three powers are united in the Sultan's person, the subjects groan under the most dreadful oppression."

Real Lessons from Doctrine of Separation of Powers—Three conclusions are tolerably obvious from a reading of the passages in Montesquieu, concerning the theory of the separation of powers: (1) That he had no objection in proper cases to an organ exercising some of the functions of another organ; (2) that he had no objection to a limited proportion of members of one organ also being members of another organ; and (3) that he did not, in fact, apprehend that there was a Parliamentary Executive in England at the time when he was writing. Like many foreign observers he saw the English Constitution as it was some few years before his time, and when the attempt was made to exclude from the Legislature all the servants of the Crown.

The proper corollary to be drawn from Montesquieu's doctrine is that organs should be sufficiently separated to avoid anything approaching identification, and that in some cases the same organ should not exercise more than one class of function in respect of the same matter.

Madison, writing in the "Federalist" (No. 47) as early as 1787, epitomized Montesquieu's main contention as being no more than this: "Where the *whole* power of one department [i.e. organ] is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." And he explained in a later number of the "Federalist" (No. 148) that, unless the organs "be so far connected and blended as to give to each a constitutional control over the others, the degree of separation, which the maxim requires

as essential to a free government, can never in practice be duly maintained."

But, even if Montesquieu's words are open to misconstruction, it must be remembered, as the French jurist, Duguit, has pointed out,[1] that Montesquieu did not intend to construct a juridical theory, but merely to demonstrate by reference to the English Constitution, the desirability of a general principle of independence in the exercise of the three main functions of government.

Effect of Doctrine of Separation of Powers on Constitutions of U.S.A. and France—The effect, however, on the formation of constitutional ideas in the United States of America and in France was profound—yet entirely different in each case.

In the United States the description by Montesquieu of a phase in British constitutional development, when the separation of organs was being insisted upon as a step towards democratic government, was seized upon as if it were an immutable principle of politics.[2] It was not realized that, when the right to democratic government was attained, a complete separation of Executive and Legislature was no longer an essential to freedom and that collaboration between Executive and Legislature might well follow by way of an improvement in the relations of the organs of government.

In France the statesmen of the Revolution used the doctrine to support the principle of the immunity of the Executive from control by the Judiciary, while, in the United States, it was made the basis of absolute separation of the Executive and Legislature, as well as of the independence of the Judiciary. "The very same doctrine which in America secures the independence of the Judiciary from the Executive is used in France to secure the independence of the Executive, nominally as against the Judiciary, but really as against the public, for the agents of the Executive thereby escape direct liability to the citizen,

[1] "Traité de Droit Constitutionnel," 10th ed., pp. 516, 519.
[2] Cf. Pollard, "Evolution of Parliament," p. 24.

being themselves, through their special Courts, the judges not only of the facts of a case, but also the interpreters of the law to be applied." [1] It should be remembered in this connection that some French lawyers regard the Judiciary and the administrative officers merely as agents of the "representative organs." [2]

The uncompromising manner in which the principle of complete "separation of powers" (or rather division of functions) was adopted in some of the States of America is exemplified by the Massachusetts declaration of rights: "In the Government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the executive and legislative powers or either of them: to the end that it may be a government of laws and not of men."

Conclusions—The remarks, made above, on the history of the doctrine of the separation of powers renders more easy a continuation of a summary regarding the separation of organs and the division of functions in the British Constitution, leading to the question of the interrelations of the organs.

Separation of Organs—The incomplete separation between organs, the "overlapping" of personnel, does not of necessity infringe the proper conclusions to be deduced from Montesquieu's doctrine, provided that the extent of the overlapping is not too great. In the case of the Legislature and the Judiciary, where members of the final Court of Appeal for Great Britain are also members of the Upper House of the Legislature, the overlapping is small; and,

[1] Bryce, "Modern Democracies," vol. ii, p. 311.

[2] Cf. Duguit, op. cit., pp. 536, 541, and Esmein, "Droit Constitutionnel," 5th ed., p. 436. That mutual checking and collaboration between organs is well understood in France at the present day may be learnt from the latter work, pp. 405-28. The French jurists have produced a large literature, and maintain a lively controversy, on the question of the separation of powers. The most authoritative arguments appear in the works of Duguit, Esmein, Jèse, Berthélemy, Haurion, Artur, Aucoc, and Lafferière.

moreover, the exercise by the members of their two different types of function is entirely distinct. Although, on other grounds, there is something to be said for complete separation, it is generally acknowledged that the Upper House gains signal advantages by the presence in their body of the "Law Lords."

There is another case of overlapping of personnel, which is due rather to fusion than to incomplete separation, namely, that involved in the Parliamentary Executive. In nearly all modern Constitutions, except those of the United States of America and Switzerland, a system which provides for easy collaboration between the Executive and the Legislature is adopted and approved. In the British Constitution there are statutes which aim at keeping the numbers of members of the Executive in the Legislature within limits; but they were framed when constitutional problems were entirely different to those of to-day, and are almost anachronisms. Any excessive influence of the Executive over the Legislature will nowadays be restrained rather by the increased application of checks than by the reduction in the extent of overlapping of personnel.

Division of Functions—Many of the instances, which have been observed in the chapters on functions, of organs exercising functions which do not conform to their nature have the justification of being either harmless survivals or necessary results of a more intricate form of civilization, involving a more specialized process of government. There are others, which are capable of no further explanation than that they are practically convenient.

(1) Of the harmless survivals there have been noticed certain legislative functions retained by the Executive; (2) of the necessary results of complexity and specialization in government are the functions of delegated legislation or of acting in a judicial capacity, conferred by the Legislature on the Executive's Departments; (3) of the instances of practical convenience are the functions of administrating estates, winding-up companies and the like, exercised by the Judiciary. The first and third do not

disturb the equipoise of government, but the second has called for increased application of checks and controls by the Legislature and the Judiciary, so that the Executive may not upset the balance, and induce arbitrary methods of government.

In this last-mentioned respect the proper principles to be inferred from the doctrine of the separation of powers may provide the means of detecting dangerous constitutional developments. It cannot be said that the Judiciary, although having powers of issuing subordinate legislation, legislate and judge on the same plane. The Judiciary in deciding cases is dealing in substantive law, whereas in issuing subordinate legislation it is dealing in matters of procedure, or adjective law. But the Executive, under recent legislation, frequently has to act in an executive and judicial, and sometimes even legislative, capacity in respect of the very same subject. These remarks apply especially to the system of the issue of "Provisional" Orders by Departments of the Executive, which are in some cases provisional only by analogy, since the confirmation of them can be effected by the Department itself. The Department is responsible, as part of the Executive, for the administration of the Act under which the Order is made. It has next the responsibility of acting in a judicial capacity in holding local inquiries and deciding between the conflicting arguments of the promoters and the opponents of a scheme. Finally, it has to act in a legislative capacity in issuing the Provisional Order. "There is thus a conflict of interest and confusion of capacity which cannot easily be reconciled."[1]

An extreme instance of this treble exercise of functions is found in the case of the Minister of Transport. Under the Light Railways Act, 1896,[2] promoters of light railways could apply to the Light Railway Commissioners for the issue of a Provisional Order enabling them to construct

[1] Sir Lynden Macassey, in the "Journal of Comparative Legislation," 3rd series, vol. v, p. 82.

[2] 59 & 60 Vict. c. 48.

light railways. The Board of Trade were empowered to confirm these Orders, which upon confirmation were, by section 10, to have the same effect as if enacted by Parliament. But, now, by the Railways Act, 1921,[1] under various provisions of which the Minister of Transport acts in an executive or administrative capacity, the promoters are to apply to the Minister of Transport, who makes and confirms the Orders (section 68 (1)). He acts, therefore, in respect of the same matter in an executive capacity, in a judicial capacity concerning preliminary inquiries and again in hearing promoters and opponents before confirming the Order, and finally in a legislative capacity in making and confirming it. It is proper to add that by section 68 (2) the Minister is enabled, if he thinks it desirable, to leave the confirmation of any Order to Parliament.

Express provision is made in some written Constitutions of foreign countries to ensure proper division of functions. The Constitution of the Republic of Austria, for instance, provides (Art. 94) that "judicial proceedings shall be kept separate in all stages from administrative legal proceedings." The article adds that "when an administrative authority has to decide upon claims under the Civil Law, any person who deems himself injured by the decision may, save as otherwise provided by law, seek a remedy against the other party through the ordinary legal channels."

Checks—Where the powers of an organ are so great that a disturbance of the balance of government becomes likely, it is found to be desirable to apply more stringent checks and controls by the other organs. In some of the States of America, for instance, the strengthening of the powers of the Governor or the Executive was a necessary counterpoise to the predominance or arbitrary action of the Legislature. In France there have been movements that the considerable power of the Legislature should be counterbalanced by an increased capacity for effectiveness in the head of the Executive. On the other hand, in the United

[1] 11 & 12 Geo. 5, c. 55.

States of America it has been remarked that "the system of governmental checks and balances has been destroyed by the persistent subordination in the practical working of the Government of the Legislature to the Executive."[1]

In this country, too, the organ, which has during, say, the last hundred years obtained a notable increase of power is the Executive. This is due in part, no doubt, to the realization, after a period of revolt against an absolute Executive, that the Executive in a democratic State may act on behalf of the people and not for its own ends, and in part to the pressure of social, economic, and international affairs, which require direction by an organ fully and suitably constructed and equipped for governing.

The application, therefore, of more stringent checks and controls by the other two organs has been invoked. The nature of these have been examined in Chapters VI and VIII; but it may be well briefly to review their effectiveness.

Checks by Legislature—As an "Executive-maker" and as an "Executive-breaker" (especially the former), the Legislature's power of control is largely unimpaired. But during the life of a Parliament the Legislature loses much of its individuality and becomes to a considerable extent the tool of the Executive. The Executive has gained the main initiative in legislation; and, even in matters of finance, which have been deemed to be under the Legislature's particular control, both estimate and expenditure in some degree escape scrutiny and check.

[1] Beck, "The Constitution of the United States." This opinion was expressed in 1924. But, only so lately as 1885, the late President Wilson, before he suspected, it seems, that he was a potential President, observed ("Congressional Government," 12th ed., p. 51) that "from whatever point we view the relations of the Executive and the Legislature [in the United States of America], it is evident that the power of the latter has steadily increased at the expense of the prerogatives of the former and that the degree in which the one of these great branches of government is balanced against the other is a very insignificant degree indeed." The fact that these two opposing views could be expressed within half a century by responsible and well-instructed observers is a commentary on the extent to which the working of the United States Constitution depends on the personal influence of the head of the Executive.

Though the system of a Parliamentary Executive may involve the Legislature in some loss of independence and effectiveness during the course of Parliaments, it avoids the necessity of the excessively stringent checks which obtain between Executive and Legislature in the Presidential or American system. Generally speaking, the greater the separation between the organs, whose activities are interconnected, the more radical in their effects are the checks and controls required. A President, with a power of veto, a Senate with a power of disallowing treaties or disapproving public service appointments or a Legislature with a power to refuse money requested by an Executive, may cause deadlocks or dislocations, which would seldom occur in Constitutions with Parliamentary Executives.

Checks by Judiciary—The checks on the Executive which are applied through the Judiciary in the British Constitution are effective in operation and wide in scope. But there are openings left to the Executive to escape control which might well be closed. These exist in some cases as a result of the powerful influence which the Executive exerts over the Legislature during the course of a Parliament, enabling it to obtain legislative sanction to uncontrolled administration. In many recent statutes it is provided that the delegated legislation issued by the Executive shall have effect, as if enacted in the enabling statute, with the result that any check on the validity of the legislation through the Judiciary is excluded. Again, there are cases where the delegated legislation is to be confirmed by the Legislature, which is not so well equipped as the Judiciary to detect excess of powers. Before confirmation there is, as the law stands at present, no opportunity for the Judiciary to declare the proposed delegated legislation invalid; and after confirmation (possibly a somewhat summary affair), it is legislation proper; and the Judiciary cannot call it in question. The applicability of the prerogative writs, prohibition, certiorari, and mandamus, does not extend to deal with every loophole.

Independence—But there are spheres of action in which

organs must of necessity be left independent of checks or controls. The Executive, if it claims that the disclosure of documents or information to the Legislature would be prejudicial to the safety or interest of the State, and if it retains the confidence of the Legislature, is not bound to disclose them. Similar principles apply in case of the claim to disclosure of documents or information before the Judiciary. And the Judiciary will not inquire into the propriety of subordinate legislation or acts done thereunder with the view of determining their validity, if the Executive is authorized to legislate or act for the safety of the State and alleges that particular legislation or a particular act is necessary to that end, unless the allegation is palpably untenable. This position is analogous to that which until recently obtained in France, where the doctrine was accepted that, in matters of high policy (*acte de gouvernement*), the Executive had a discretionary authority which could not be controlled by the Judiciary.[1] So, too, technical contraventions of the law of the land by members or officers of the Legislature in matters relating to that organ's internal proceedings and the enforcement of discipline necessary to the exercise of its functions cannot be checked through the Judiciary.

The most essential requirement of independence is in respect of the Judiciary. The Judiciary is now free from all control by the Executive in the exercise of its functions, although the judges are appointed by the Executive. The appointments to judicial offices are increasingly remote from considerations of party politics; and, even if the tradition of appointment of politicians to high judicial office were cited to the contrary, there is no question of judges, once appointed, being influenced by the Executive.

Just, however, as opportunity for collaboration between Executive and Legislature is required, so there must be some provision for contact and co-ordination between the Executive and the Judiciary. This provision in the British Constitution is, at the present time, effected in part through

[1] Cf. Dicey, "Law of the Constitution," 8th ed., p. 366.

the agency of the Lord Chancellor, who is a member of both organs, and in part through the administration of a Department of the Executive, the Home Office. In other Constitutions the necessary link is provided by a Ministry of Justice.

The Public as an Organ—In countries where the Referendum and the Initiative (in legislation) have been introduced, the people take a direct part in the governmental system, and are, to all intents, an organ of government, though only exercising their powers occasionally.[1]

Two hundred years ago in this country those of the people possessing the franchise merely influenced the Legislature by the casting of their votes. Nowadays the enlarged electorate also exerts a constant influence on both the Executive and the Legislature through public opinion. If a Bill is introduced into a House of the Legislature and public opinion condemns it, it is probable that the Bill will soon be abandoned. The Legislature, too, in conferring on the Executive powers of issuing delegated legislation provides in many cases that the purport of the legislation shall be advertised, so as to enable the public to protest against it before its issue, if so minded. In such ways as these the people are coming more directly to influence the machinery of government. And, as Lord Bryce has suggested, practical mastery ripens into legal authority.

[1] "Direct Government," as it is sometimes described.

APPENDICES

[THE specimens of Provisional Order Confirmation Acts (scheduling Provisional Orders) and of various classes of subordinate legislation, in Appendices I and II, are chosen largely with a view to their brevity. They illustrate rather the form than the substance, and must not, therefore, be regarded as indicative of the importance of the contents of these methods of legislation. Their character and bulk may be appreciated by reference to the annual volumes of Local Acts and Statutory Rules and Orders, published by authority.]

APPENDIX I

Specimens of Provisional Order Confirmation Acts (Scheduling Provisional Orders)

SPECIMEN A

(An Act scheduling a Provisional Order of local character)

12 & 13 Geo. 5, ch. xl.

An Act to confirm certain Provisional Orders of the Minister of Health relating to Derby Ellesmere Port and Whitby Newark Oldham and the Rhymney Valley Sewerage Board [20th July 1922].

Whereas the Minister of Health has made the Provisional Orders set forth in the schedule hereto under the provisions of the Public Health Act 1875 : 38 & 39 c. 55.

And whereas it is requisite that the said Orders should be confirmed by Parliament :

Be it therefore enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows :—

1. The Orders set out in the schedule hereto shall be and the same are hereby confirmed and all the provisions thereof shall have full validity and force. Orders i schedule confirme

2. This Act may be cited as the Ministry of Health Provisional Orders Confirmation (No. 3) Act 1922. Short ti

SCHEDULE

Borough of Derby

Provisional Order for altering or amending the Derby Corporation Act 1913

Whereas the Borough of Derby (hereinafter referred to as " the Borough ") is an urban sanitary district of which the Mayor Aldermen and Burgesses acting by the Council (hereinafter referred to as " the Corporation ") are the local authority and the unrepealed provisions of the Derby Corporation Act 1913 (hereinafter referred to as " the Local Act ") are in force in the Borough ; Derby C

And whereas by Section 101 of the Local Act provision is made empowering the Corporation to make charges for the use of portions of their recreation grounds set apart for the purposes of games or recreations and for the admission of the public thereto while set apart;

And whereas the Corporation have under the provisions of Section 95 of the Public Health Acts Amendment Act 1907 appropriated for the purposes of public walks and pleasure grounds the land described in the Schedule hereto (which land is hereinafter referred to as "the Recreation Ground");

And whereas the Corporation have made application to the Minister of Health for the issue of a Provisional Order to alter or amend the Local Act in the manner hereinafter set forth:

Now therefore the Minister of Health in pursuance of the powers given to him by Section 303 of the Public Health Act 1875 and of all other powers enabling him in that behalf hereby orders that from and after the date of the Act of Parliament confirming this Order the Local Act shall be altered and amended so that the following provisions shall take effect that is to say:—

Power to set apart part of recreation ground &c.

1. Subject to any covenant or condition in any lease conveyance or agreement relating to the Recreation Ground the Corporation may—

(a) at any time set apart any part or parts of the Recreation Ground and may adapt the same for the purpose of any game recreation contest match or pastime;

(b) for any such purpose let the same on lease or otherwise to any club or person;

(c) make or authorise any such club or person to make reasonable charges for the use of or access to any part so set apart;

(d) provide erect manage maintain remove or let to any club or person or agree with any club or person for the provision erection management maintenance or removal of any pavilions buildings works and conveniences on the Recreation Ground or in connection therewith and charge or authorise any club or person to charge for admission thereto or in respect of the use thereof; and

(e) exclude the public from the parts of the Recreation Ground so set apart and from such pavilions buildings works and conveniences.

Application of Section 164 of Public Health Act 1875.

2. Subject to the provisions of this Order the Recreation Ground shall be deemed to be a pleasure ground purchased by the Corporation under the provisions of Section 164 of the Public Health Act 1875.

Short title.

3. This Order may be cited as the Derby Order 1922.

THE SCHEDULE

All that piece of land situate in the Parish of Sinfin Moor in the County of Derby and containing 44·5 acres or thereabouts which is bounded on the north-east by a line parallel with and 40 yards distant from the south-west side of Osmaston Park Road on the north-west by the Osmaston Park Road Recreation Ground on the south-west partly by the north-eastern boundaries of enclosures numbered 5 and 12 on the ₁₁₁₁th Ordnance Map (1914 Edition) of the Parish of Sinfin Moor partly by Moor Lane partly by the northern boundary of enclosure numbered 20 on the said Ordnance Map and partly by a line drawn in continuation of the said boundary across enclosure numbered 22 on the said map and on the south-east by the boundary between the Urban District of Alvaston and Boulton and the Parish of Sinfin Moor except the site of a proposed new road 52 feet in width from Osmaston Park Road across enclosure numbered 8 on the said map and a building depth of 50 yards on the south-east side of such proposed new road.

Given under the Official Seal of the Minister of Health this Fifth day of April One thousand nine hundred and twenty-two.

(L.S.) F. L. TURNER
Assistant Secretary Ministry of Health.

SPECIMEN B

(An Act scheduling a Provisional Order of general character)

12 Geo. 5, ch. iv.

AN ACT TO CONFIRM A PROVISIONAL ORDER MADE BY ONE OF HIS MAJESTY'S PRINCIPAL SECRETARIES OF STATE UNDER THE PROVISIONAL ORDER (MARRIAGES) ACT 1905 [12th April 1922].

Whereas the Right Honourable Edward Shortt one of His Majesty's Principal Secretaries of State made the Provisional Order set out in the schedule hereunto annexed under the provisions of the Provisional Order (Marriages) Act 1905: 5 Edw. 7, c. 23.

And whereas it is requisite that the said Order should be confirmed by Parliament:

Be it therefore enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—

Order in schedule confirmed.

1. The Order as set out in the schedule hereunto annexed is hereby confirmed.

Short title.

2. This Act may be cited as the Provisional Order (Marriages) Confirmation Act 1922.

SCHEDULE

Whereas power is given to a Secretary of State by the Provisional Order (Marriages) Act 1905 in the case of marriages solemnized in England which appear to him to be invalid or of doubtful validity by reason of some informality to make a Provisional Order for the purpose of removing the invalidity or doubt:

And whereas certain marriages have been solemnized in the parish church of St. Matthew and the Chapel at Oxhey in the county of Hertford between the fifth day of January one thousand nine hundred and eighteen and the thirty-first day of December one thousand nine hundred and twenty without the due publication of banns or the production of a licence as required by the provisions of the Marriage Act 1823:

And whereas it is expedient to remove all doubts touching the validity of the marriages so solemnized:

Now therefore I the Right Honourable Edward Shortt one of His Majesty's Principal Secretaries of State in pursuance of the powers conferred on me by the said Provisional Order (Marriages) Act 1905 do hereby order that on and after the date of the Act of Parliament confirming this Order the following provisions shall have effect:—

1. All marriages solemnized without due publication of banns or licence as required by the Marriage Act 1823 between the fifth day of January one thousand nine hundred and eighteen and the thirty-first day of December one thousand nine hundred and twenty in the parish church of St. Matthew and the Chapel at Oxhey in the county of Hertford shall be and shall be deemed to have been as valid as if banns of matrimony had been published or a licence had been obtained in accordance with the requirements of that Act.

2. The registers of the marriages so solemnized or copies of the registers shall be received in all courts as evidence of these marriages in the same manner as registers of marriages duly solemnized or copies thereof are by law receivable in evidence.

Given under my hand this twenty-sixth day of July one thousand nine hundred and twenty-one.

E. SHORTT.

SPECIMEN C

(An Act scheduling a Provisional Order under the Private Legislation Procedure (Scotland) Act 1899)

13 & 14 Geo. 5, ch. xlix.

AN ACT TO CONFIRM A PROVISIONAL ORDER UNDER THE PRIVATE LEGISLATION PROCEDURE (SCOTLAND) ACT 1899 RELATING TO FRASERBURGH HARBOUR [18th July 1923].

Whereas His Majesty's Secretary for Scotland has made the Provisional Order set forth in the schedule hereunto annexed under the provisions of the Private Legislation Procedure (Scotland) Act 1899 and it is requisite that the said Order should be confirmed by Parliament: 62 & 63 Vict. c. 47.

Be it therefore enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—

1. The Provisional Order contained in the schedule hereunto annexed shall be and the same is hereby confirmed. Confirmation of Order in schedule.

2. This Act may be cited as the Fraserburgh Harbour Order Confirmation Act 1923. Short title.

SCHEDULE

FRASERBURGH HARBOUR

Provisional Order for enabling the provost magistrates and councillors of the burgh of Fraserburgh in the county of Aberdeen to guarantee repayment of money lent to the Fraserburgh Harbour Commissioners by the Treasury and for other purposes.

Whereas by the Fraserburgh Harbour Act 1878 the then existing harbour of Fraserburgh was transferred to the Commissioners incorporated by that Act under the name of the Fraserburgh Harbour Commissioners (hereinafter called "the Harbour Commissioners") and the Harbour Commissioners were authorised by that Act to construct additional works and further powers were conferred upon the Harbour Commissioners by the Fraserburgh Harbour Acts 1878 to 1919:

And whereas the Harbour Commissioners have been offered by the Treasury on the recommendation of the Development Commissioners a loan of thirty-one thousand two hundred and fifty pounds for the extension of the south breakwater of the harbour of Fraserburgh for the purpose of protecting the existing

harbours which are at present much exposed to storms and have become seriously damaged:

And whereas the terms upon which the said loan has been offered provide inter alia for the repayment of half of the principal sum to be lent and the payment of the interest on the said half of the principal sum being guaranteed by the provost magistrates and councillors of the burgh of Fraserburgh (hereinafter referred to as "the Town Council"):

And whereas it is expedient and in the public interest that the Town Council should be authorised to give such guarantee in respect of such loan and any other loans which the Harbour Commissioners may obtain from the Treasury:

And whereas the purpose aforesaid cannot be effected without an Order of the Secretary for Scotland confirmed by Parliament under the provisions of the Private Legislation Procedure (Scotland) Act 1899:

Now therefore in pursuance of the powers contained in the last-mentioned Act the Secretary for Scotland orders as follows:—

Short and collective titles.

1. This Order may be cited as the Fraserburgh Harbour Order 1923 and this Order and the Fraserburgh Harbour Acts 1878 to 1919 may be cited together as the Fraserburgh Harbour Acts 1878 to 1923.

Interpretation.

2. In this Order unless the context otherwise requires—

"The Harbour Commissioners" means the Fraserburgh Harbour Commissioners;

"The burgh" means the burgh of Fraserburgh in the county of Aberdeen;

"The Town Council" means the provost magistrates and councillors of the burgh.

Town Council may guarantee repayment of loan to Harbour Commissioners from Treasury.

3. (1) The power conferred on the Town Council by section 3 (Power to Town Council to give guarantee) of the Fraserburgh Harbour Order 1894 and section 17 (Alteration and increase of borrowing powers) of the Fraserburgh Harbour Order 1905 of charging any fund or rate under their control for the purpose of aiding the Harbour Commissioners in raising a loan or loans from the Public Works Loan Commissioners may be exercised by the Town Council for the purpose of aiding the Harbour Commissioners in raising a loan or loans from the Treasury and the Town Council may give such aid by guaranteeing the principal and interest of the loan or loans.

(2) The Town Council may grant such guarantee and may charge or assign any fund or rate under their control prior to the actual advance of such loan or loans or of any instalments thereof.

4. The following sections of the Fraserburgh Harbour Order 1894 shall extend and apply to the exercise by the Town Council of any powers granted by this Order of guaranteeing a loan or loans made by the Treasury to the Harbour Commissioners in the same manner and to the same extent as if the said sections had been re-enacted in this Order and made applicable to a loan or loans from the Treasury (that is to say) :— Application of sections of Fraserburgh Harbour Order 1894.

Section 4 But only under special resolution ;
Section 5 Harbour Commissioners to furnish accounts to Town Council ;
Section 6 Proceedings in case of default ;
Section 8 Sums paid under guarantee to be repaid ;
Section 9 Application of money repaid ;
Section 10 Powers to Town Council to provide sums for purpose of guarantee ;
Section 12 Saving for existing charges ;
Section 13 Reference of disputes :

Provided that in the application of the said sections the expression " the Treasury or their nominees or assignees in right of such guarantee " shall be substituted for the expression "the Public Works Loan Commissioners " where the same occurs in those sections.

5. Nothing in this Order and no guarantee given thereunder by the Town Council shall prejudice any guarantee given by the Town Council to the Public Works Loan Commissioners under the authority of the Fraserburgh Harbour Order 1894 and the Fraserburgh Harbour Order 1905 or affect the priority of any existing charge upon any fund or rate of the burgh for the repayment of any loan to those Commissioners. Saving rights of Public Works Loan Commissioners.

6. Any special or other formal resolution passed by the Town Council before the date of the passing of the Act confirming this Order but in other respects in compliance with the requirements of this Order and in contemplation of the same being made and confirmed shall be deemed to be a sufficient resolution for the purpose of this Order. Resolution of Town Council effective though passed before confirmation of Order.

7. All costs charges and expenses of and incident to the preparing for obtaining passing and confirming of this Order or otherwise incurred in reference thereto shall be paid by the Harbour Commissioners and if paid out of borrowed moneys any loans raised for the purpose shall be paid off out of revenue within five years from the date of the passing of the Act confirming this Order. Costs of Order.

APPENDIX II

SPECIMENS OF SUBORDINATE "LEGISLATION"

SPECIMEN A

(A Proclamation)

THE PROHIBITION OF IMPORT (No. 30) PROCLAMATION, 1919, Dated March 28, 1919.

By the King.

A Proclamation for prohibiting the Importation of certain Rouble Notes into the United Kingdom. George R.I.

Whereas it is desirable to prohibit the importation of certain Rouble Notes into the United Kingdom:

Now, therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation in pursuance of Section 43 of the Customs Consolidation Act, 1876, and of all other powers enabling Us in that behalf, and We do hereby proclaim, direct and ordain as follows:—

The importation into the United Kingdom of all Rouble Notes (other than Rouble Notes issued by the Caisse d'Emission of the Provisional Government of Archangel) is hereby prohibited:

Provided always, and it is hereby declared, that this prohibition shall not apply to any such Notes which are imported under licence given by or on behalf of Our Treasury and subject to the provisions and conditions of such licence.

This Proclamation may be cited as the Prohibition of Import (No. 30) Proclamation, 1919, and shall come into operation from the date hereof.

Given at Our Court at Buckingham Palace, this Twenty-Eighth day of March, in the year of our Lord One thousand nine hundred and nineteen, and in the Ninth year of Our Reign.

God save the King.

SPECIMEN B

(An Order in Council)

ORDER IN COUNCIL (No. 2A) UNDER THE EXPLOSIVES ACT, 1875 (38 & 39 VICT. C. 17), AMENDING THE ORDER IN COUNCIL OF NOVEMBER 27, 1875 (No. 2), MAKING GENERAL RULES FOR FACTORIES FOR EXPLOSIVES OTHER THAN GUNPOWDER.

At the Court of Buckingham Palace, the 11th day of October, 1923.

PRESENT,

The King's Most Excellent Majesty in Council.

Whereas by an Order in Council, dated 27th November, 1875, it is ordered and prescribed that certain General Rules shall be observed in factories for explosives other than gunpowder:

And whereas by section 83 of the Explosives Act, 1875, His Majesty may, by Order in Council, from time to time revoke, add to or alter any previous Orders in Council under this Act:

And whereas the provisions of section 1 of the Rules Publication Act, 1893,[1] have been complied with:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order and prescribe that the said General Rules shall be altered as follows:—

For Rule 11, the following shall be substituted, namely,

"(11) A person under the age of eighteen years shall not be employed in or enter any danger building except in the presence and under the supervision of some person of the age of twenty-one years or upwards, and a person under the age of sixteen years, shall not be employed in any such building except in some process which has been declared by an Order made by the Secretary of State to be a process which is not in itself dangerous and except in the presence and under the supervision of some person of the age of twenty-one years or upwards."

M. P. A. HANKEY.

[1] 56-7 Vict. c. 66.

SPECIMEN C

(An Order in Council fixing a date for an Act of Parliament to come into operation)

ORDER IN COUNCIL FIXING APRIL 1, 1923, AS THE APPOINTED DAY FOR THE COMMENCEMENT OF THE IMPORTATION OF ANIMALS ACT, 1922 (SESSION 2) (13 GEO. 5, SESS. 2, C. 5).

At the Court at Buckingham Palace, the 12th day of March, 1923.

PRESENT,
The King's Most Excellent Majesty in Council.

Whereas it is provided by the Importation of Animals Act, 1922 (Session 2) (hereinafter referred to as the Act), that the Act shall come into operation on such date, not later than the first day of April, nineteen hundred and twenty-three, as His Majesty may by Order in Council appoint:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Importation of Animals Order, 1923.

2. The 1st day of April, 1923, is hereby fixed as the date on which the Act shall come into operation.

ALMERIC FITZROY.

SPECIMEN D

(Regulations)

THE UNEMPLOYMENT INSURANCE (COMPUTATION OF PERIODS) REGULATIONS, 1923, DATED APRIL 10, 1923, MADE BY THE MINISTER OF LABOUR UNDER THE UNEMPLOYMENT INSURANCE ACT, 1923 (13 GEO. 5, C. 2).[1]

For the purpose of providing that in computing a continuous period of unemployment within the meaning of section five of the Unemployment Insurance Act, 1923 (hereinafter referred to as "the Act") a period of consecutive days shall be treated as exclusive of Sundays, and for the purpose of allowing in certain cases an earlier date to be substituted for that prescribed by section seven of the Act as the date of the commencement of a period of unemployment, the Minister of Labour by virtue of the powers conferred on him by the said sections and of all other

[1] These Regulations although Statutory are provisional only. Permanent Regulations will be made later.

powers enabling him in that behalf hereby makes the following Regulations:—

1. For the purposes of section five of the Act of 1923 a period of consecutive days shall be exclusive of Sundays.

2. If in any case an insured contributor claiming benefit in respect of a period of unemployment proves that he was on a date earlier than that upon which he made application for benefit in the prescribed manner in all respects qualified to make the claim, and that there was good cause for his failure to make the claim on that date, that date shall for the purpose of determining the commencement of that period of unemployment be substituted for the date on which the insured contributor made application for benefit in the prescribed manner.

3. These Regulations may be cited as the Unemployment Insurance (Computation of Periods) Regulations, 1923.

Signed by Order of the Minister of Labour this tenth day of April, 1923.

H. J. WILSON,
Secretary of the Ministry
of Labour.

SPECIMEN E

(*Regulations*)

REGULATIONS DATED FEBRUARY 11, 1922, MADE BY THE MINISTER OF LABOUR UNDER SECTION 11 OF THE TRADE BOARDS ACT, 1909 (9 EDW. 7, C. 22), WITH RESPECT TO THE CONSTITUTION OF TRADE BOARDS.

The Minister of Labour, in pursuance of his powers under section 11 of the Trade Boards Act, 1909, and of any other powers him hereunto enabling, is pleased to make the annexed Regulation.

Notwithstanding anything contained in any Regulation with respect to the constitution and proceedings of a particular Trade Board—

(*a*) the seat of an appointed member of any Trade Board which is rendered vacant by effluxion of time under the Regulations with respect to the constitution and proceedings of the Board shall be temporarily occupied by the retiring member until a successor is appointed;

(*b*) the office of Chairman or of Deputy Chairman of any Trade Board which is rendered vacant by effluxion of time under the Regulations with respect to the constitution and proceedings of the Board shall be temporarily occupied by the retiring Chairman or Deputy

Chairman, as the case may be, until a successor is appointed.

Given under the Seal of the Minister of Labour this 11th day of February in the year One thousand nine hundred and twenty-two.

(L.S.)

H. J. WILSON,
Secretary of the Ministry of Labour.

SPECIMEN F

(*Rules*)

THE RULES OF THE SUPREME COURT (No. 1), 1922. DATED FEBRUARY 28, 1922.

We, the Rule Committee of the Supreme Court, hereby make the following Rules :—

ORDER XXXVI

1. Rule 23 of Order XXXVI is hereby amended by striking out

Carnarvon.....Bangor.
and
Winchester..... Southampton.

ORDER XXXVII

Rotation of examiners.

2. Rule 41 of Order XXXVII is hereby annulled, and the following Rule shall stand in lieu thereof, viz. :—

"41. The examinations to be taken before the examiners of the court shall be distributed among them in rotation by such clerk in the office of the registrars of the Chancery Division as the chief registrar may from time to time determine."

ORDER LI

Distribution of business amongst the conveyancing counsel.

3. Rule 9 of Order LI is hereby annulled, and the following Rule shall stand in lieu thereof, viz. :—

"9. The business to be referred to the conveyancing counsel of the court shall be distributed among them in rotation by such clerk in the office of the registrars of the Chancery Division as the chief registrar may from time to time determine."

ORDER LVIII

4. The following Rule shall be inserted in Order LVIII after Rule 9:— Bankruptcy appeals from county courts.

"9A. Appeals from orders in bankruptcy matters made by a County Court shall be heard by a Divisional Court of that Division of the High Court of which the Judge to whom bankruptcy business is for the time being assigned is a member."

ORDER LXIII

5. The following words shall be inserted in Order LXIII at the end of Rule 6 thereof, viz.:—

"and such days as the Lord Chancellor, with the concurrence of the Lord Chief Justice, the Master of the Rolls and the President of the Probate, Divorce and Admiralty Division, shall direct."

ORDER LXIV

6. Rule 11 of Order LXIV is hereby amended by substituting "one" for "two" in the two places where two o'clock is referred to in that Rule with reference to the service on Saturdays.

7. These Rules may be cited as the Rules of the Supreme Court (No. 1), 1922, and the Rules of the Supreme Court, 1883, shall have effect as amended by these Rules.

8. The Rules mentioned in the first column of the Schedule to these Rules which came into operation on the dates mentioned in the second column of the said Schedule, shall continue in force till the 15th day of March, 1922, on which day the said Rules mentioned in the first column of the said Schedule shall be superseded and replaced by the Rules mentioned in the third column of the said Schedule.

Dated the 28th day of February, 1922.

Birkenhead, C.
Trevethin, C.J.
Sterndale, M.R.
Henry E. Duke, P.
R. M. Bray, J.
Charles H. Sargant, J.
P. Ogden Lawrence, J.
A. A. Roche, J.
T. R. Hughes.
E. W. Hansell.
C. H. Morton.
Roger Gregory.

SCHEDULE

1st Column.	2nd Column.	3rd Column.
The Rules of the Supreme Court (No. 2), 1921.	25th July, 1921.	Rules 1 & 6 of the Rules of the Supreme Court (No. 1), 1922.
The Rules of the Supreme Court (No. 3), 1921.	21st November, 1921.	Rules 2 3 & 4 of the Rules of the Supreme Court (No. 1), 1922.
The Rules of the Supreme Court (No. 4), 1921.	24th November, 1921.	Rule 5 of the Rules of the Supreme Court (No. 1), 1922.

SPECIMEN G

(*Rules*)

RULE, DATED APRIL 13, 1923, MADE BY THE SECRETARY OF STATE UNDER SECTION 2 (1) OF THE ANTHRAX PREVENTION ACT, 1919 (9 & 10 GEO. 5, C. 23), PROVIDING FOR THE PAYMENT OF FEES IN RESPECT OF THE DISINFECTION OF INFECTED GOODS.

In pursuance of sub-section (1) of section 2 of the Anthrax Prevention Act, 1919, I hereby make the following Rule :—

The fee payable by importers of infected goods in respect of the disinfection thereof at the Government Wool Disinfecting Station (Home Office), Liverpool, shall as from 1st May, 1923 and thereafter until further Order be in accordance with the following scale :

Material losing during the process of disinfection 20 per cent. or less of its weight : 1½*d.* per lb. of material calculated on the weight of the material before disinfection.

Material losing during the process of disinfection more than 20 per cent. and up to 35 per cent. of its weight : 1¼*d.* per lb. of material calculated on the weight of the material before disinfection.

Material losing during the process of disinfection more than 35 per cent. of its weight : 1*d.* per lb. of material calculated on the weight of the material before disinfection.

W. C. BRIDGEMAN,
One of His Majesty's Principal Secretaries of State.

Home Office, Whitehall,
13th April, 1923.

SPECIMEN H

(*An Order—legislative in character*)

THE IMPORTATION OF PLUMAGE (No. 2) ORDER, 1922. DATED JUNE 12, 1922.

The Board of Trade in pursuance of the powers conferred upon them by Section 2 Sub-section (3) of the Importation of Plumage (Prohibition) Act, 1921 (11 & 12 Geo. 5. c. 16), and of all other powers enabling them in that behalf, having taken into consideration recommendations made in the matter by the Advisory Committee appointed under Section 3 of the said Act, hereby make the following Order :—

1. This Order may be cited as the Importation of Plumage (No. 2) Order, 1922.

2. There shall be added to the Schedule to the said Act the names of the following birds :—

Common Jay (*Garrulus Glandarius*)	Order *Passeriformes*.
Common Magpie (*Pica Pica*) . .	Order *Passeriformes*.
Common Starling (*Sturnus Vulgaris*)	Order *Passeriformes*.
Java Sparrow (*Munia Oryzivora*) .	Order *Passeriformes*.
West African Ring-necked Parrakeet (*Palæornis Docilis*) . . .	Order *Psittaciformes*.
Chinese Bustard (*Otis Tarda Dybowskyi*)	Order *Charadriiformes*.
Green (or Japanese) Pheasant (*Phasianus Versicolor*)	Order *Galliformes*.
Copper Pheasant (*Phasianus Soemmerringi*)	Order *Galliformes*.
Golden Pheasant (*Chrysolophus Pictus*)	Order *Galliformes*.

Dated this 12th day of June, 1922.

S. J. CHAPMAN,
A Secretary, Board of Trade.

SPECIMEN I

(*An Order—procedural in character*)

THE CORONERS INQUISITION ORDER, 1923, DATED NOVEMBER 12, 1923, PROVIDING FOR INFANTICIDE IN FORM OF INQUISITION.

I, George Viscount Cave, Lord High Chancellor of Great Britain, in pursuance of sub-section (2) of section 18 of the Coroners Act, 1887 (50 & 51 Vict. c. 71), do hereby order as follows :—

1. There shall be inserted in paragraph (*c*) of the Form of Inquisition contained in the Schedule to the Order of the Lord Chancellor dated the 12th day of June, 1916 (S.R. & O., 1916, No. 374), after the words "Or, do further say that the said E.F. on the said day of , 191 , in the County of unlawfully killed the said C.D." the following words :—

> "*Or*, do further say that the said E.F. on the day of 192 , in the County of by the unlawful and wilful act (or omission) aforesaid caused the death of her newly-born child, but at the time of the act (or omission) she had not fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind was then disturbed and that she was guilty of infanticide."

2. This Order may be cited as the Coroners Inquisition Order, 1923, and shall be read and construed with the said Order dated the 12th day of June, 1916, which shall have effect as amended by this Order.

Dated this 12th day of November, 1923.

Cave, C.

SPECIMEN J

(*An Order—executive in character*)

ORDER OF THE BOARD OF TRADE, DATED JANUARY 9, 1922, UNDER SECTION 7 OF THE GAS REGULATION ACT, 1920 (10 & 11 GEO. 5, C. 28), PRESCRIBING THE RATE OF CONTRIBUTION TO THE GAS FUND FOR THE YEAR 1922.

In pursuance of the powers conferred upon them by section 7 of the Gas Regulation Act, 1920, the Board of Trade hereby prescribe that :—

1. The rate of contribution to the Gas Fund for the year 1922 shall be three shillings for each million cubic feet of gas sold during the year 1921.

2. Such contribution shall, on or before the 1st April, 1922, be paid to the Board of Trade at Great George Street, London, S.W.1, by any Gas Undertakers with respect to whom an order under the said Act shall have been made, by cheque made payable to the "Assistant Secretary for Finance, Board of Trade," and crossed "Gas Fund Account."

Dated the 9th day of January, 1922.

H. A. PAYNE,
A Secretary to the Board of Trade.

SPECIMEN K

(*An Order—executive in character*)

THE CENSUS OF PRODUCTION (1925) ORDER, 1923, DATED DECEMBER 18, 1923, MADE BY THE BOARD OF TRADE, DETERMINING THAT A CENSUS OF PRODUCTION SHALL BE TAKEN IN THE YEAR 1925.

Whereas by section 1 subsection (2) of the Census of Production Act, 1917,[1] it is provided that a Census shall be taken in any year which is fixed for the purpose by an Order made by the Board of Trade and laid before Parliament: Provided that there is at least a year's interval between the date on which the Order is made by the Board of Trade and the commencement of the year in which the Census is to be taken.

Now, therefore, the Board of Trade in pursuance of the powers conferred upon them by the said section 1 sub-section (2) of the Census of Production Act, 1917, and of all other powers enabling them in that behalf, hereby make the following Order.

1. A Census of Production shall be taken in the year 1925 in respect of production in the year 1924.

2. This Order may be cited as The Census of Production (1925) Order, 1923.

Dated the 18th day of December, 1923.

S. J. CHAPMAN,
A Secretary to the Board of Trade.

[1] 7-8 Geo. 5, c. 2.

APPENDIX III

SPECIMENS OF ESTIMATES AND APPROPRIATION ACCOUNTS

SPECIMEN A

(*Estimates, Civil Services* (1922-23) *Class II, Vote* 6)

FOREIGN OFFICE

I. ESTIMATE of the Amount required in the Year ending 31 March 1923 to pay the Salaries and Expenses of the Department of HIS MAJESTY'S SECRETARY OF STATE FOR FOREIGN AFFAIRS, including the News Department.

Two Hundred and Forty-four Thousand Six Hundred and Seventy-nine Pounds.

II. SUBHEADS under which this Vote will be accounted for by the FOREIGN OFFICE.

	1922-23.	1921-22.	Increase.	Decrease.
	£	£	£	£
A.—Salaries, Wages, and Allowances	287,563	314,308	—	26,745
B.—Messengers' Salaries . . .	14,916	18,269	—	3,353
C.— Ditto Travelling Expenses	22,500	30,000	—	7,500
D.—Incidental Expenses . . .	3,690	4,357	—	667
E.—News Department: Expenses .	2,900	4,150	—	1,250
GROSS TOTAL . £	331,569	371,084	—	39,515
Deduct—				
F.—Appropriations in Aid . .	86,890	100,350	13,460	—
NET TOTAL . £	244,679	270,734[1]	13,460	39,515

NET DECREASE

[1] Total original Net Estimate, 1921-22 . £212,520
Add—Transfer from Navy Estimates 32,214
Supplementary Estimate (H.C. 1 of 1922) 26,000
£270,734

	1922-23.	1921-22.
The total expenditure in connection with this Service is estimated as follows:—	£	
Gross Estimate above	331,569	371,084
Estimated amounts included in other Estimates in connection with this Service:—		
Office Accommodation (Buildings, Furniture, Fuel and Light, etc.), Class I., 10 . .	22,735	25,765
Rates, Class I., 13	7,300	9,000
Stationery and Printing, Class II., 31:—		
Printing	30,000	23,700
Stationery and Office Supplies . . .	19,000	32,300
Superannuation, etc., Class VI., 1 . .	11,480	11,525
Post Office, Revenue Departments, No. 3 .	13,150	20,110
TOTAL EXPENDITURE . £	435,234	493,484
The receipts in connection with this Service are estimated as follows:—		
Appropriations in Aid above . . £	86,890	100,350

NOTE.—Provision is made for Foreign Telegrams under Class V., 1, Subhead KK.

Provision is made for expenditure in connection with the News Department as follows:—

Foreign Office, Class II., 6, Subhead A . .	£8,396
" " Subhead E . .	2,900
Diplomatic and Consular Services, Class V., Subhead K.	17,958

III. DETAILS OF THE FOREGOING.

A.—SALARIES, WAGES, AND ALLOWANCES:

Numbers. 1921-22.	Numbers. 1922-23.		1922-23.	1921-22.
			£	£
1	1	Secretary of State . (5,000*l.* *inclusive*)	5,000	5,000
1	1	Under-Secretary of State . . . (3,000*l.*	3,000	3,000
1	1	Ditto ditto . (1,500*l.* *inclusive*)	1,500	1,500
1	1	Assistant ditto . . . . (2,200*l.*	2,200	2,200
1	1	Ditto ditto (Principal Assistant Secretary) (1,200*l.*–100*l.*–1,500*l.*)	1,325	1,200

[Then follow further details of Subhead A, and details of Subheads B, C, D, E, and F.]

SPECIMEN B

(*Appropriation Accounts, Civil Services*, 1922-23, *Class II, Vote* 6)

FOREIGN OFFICE

ACCOUNT of the Sum Expended, in the Year ended 31 March 1923, compared with the Sum Granted, for the Salaries and Expenses of the Department of HIS MAJESTY'S SECRETARY OF STATE FOR FOREIGN AFFAIRS, including the NEWS DEPARTMENT.

Service.	Grant.	Expenditure.	Expenditure Compared with Grant.	
			Less than Granted.	More than Granted.
	£	£ s. d.	£ s. d.	£ s. d.
A.—Salaries, Wages, and Allowances . .	287,563	263,641 7 6	23,921 12 6	—
B.—Messengers' Salaries	14,916	13,770 8 9	1,145 11 3	—
C.—Messengers' Travelling Expenses .	22,500	22,123 6 9	376 13 3	—
D.—Incidental Expenses .	3,690	1,771 5 2	1,918 14 10	—
E.—News Department Expenses . .	2,900	2,087 9 10	812 10 2	—
EE.—Losses . . .	—	40 12 6	—	40 12 6
GROSS TOTAL £	331,569	303,434 10 6	28,175 2 —	40 12 6
			Surplus of Gross Estimate over Expenditure. £28,134 9 6	
	Estimated	Realized.	Surplus of Appropriations in Aid realized.	
Deduct—	—	—		
F.—Appropriations in Aid	86,890	114,349 10 7	£27,459 10 7	
NET TOTAL £	244,679	189,084 19 11	Total Surplus to be surrendered. £55,594 — 1	

EXPLANATION OF THE CAUSES OF VARIATION BETWEEN EXPENDITURE AND GRANT

A.—Savings through reduction of the rate of bonus (4,300*l.*) and delay in filling permanent appointments (3,700*l.*); reduction in the temporary staff, and in their salaries consequent on the fall

in the cost of living—Foreign Office (7,800*l.*), Passport Offices (9,500*l.*). Savings reduced by the salary of the Finance Officer which was not provided for (1,400*l.*).

B.—Saving through reduction in the rate of bonus (120*l.*). on the provision for temporary Home Service Messengers (900*l.*), and through delayed appointments (120*l.*).

C.—The estimate can be only approximate.

D.—An accurate estimate during the transition to normal circumstances is impossible. Economies have been effected mainly in expenditure on newspapers (370*l.*), uniforms for office servants (320*l.*), translations (120*l.*), and miscellaneous services (500*l.*); and the hire of a motor for night staff came to an end early in the year (330*l.*).

E.—Expenditure is largely governed by circumstances. Economies have been effected in connection with Press articles (190*l.*), purchase and distribution of newspapers (460*l.*), and miscellaneous services (120*l.*). The estimate has been reduced in the next year.

EE.—Cancelled passport stamps to the face value of 40*l.* 12*s.* 6*d.* which were originally paid for, and should have been returned to the Inland Revenue to be replaced by fresh stamps, were lost. As the Inland Revenue were unable to replace them without the production of the cancelled stamps, the amount has been charged to the Vote as a loss in order to clear the account, although no actual loss to public funds has occurred. (S/18868.)

F.—Appropriations in Aid:—	Estimated.	Realized.
	£	£ s. d.
Passport fees	85,000	[1] 112,688 13 10
Refund of salaries of officers seconded to the League of Nations	1,840	1,660 16 9
News Department	50	—
	£86,890	114,349 10 7

EXTRA REMUNERATION (exceeding 50*l.*)

From the Vote for Imperial War Museum an Establishment and Accounts Officer (400*l.*-500*l.*) received 75*l.* for services rendered to that department.

From the Vote for Diplomatic and Consular Services a Senior Establishment and Accounts Officer (550-700*l.*) received a gratuity of 80*l.* for services at the Washington Disarmament Conference.

[1] Surplus due to increased demand for passports.

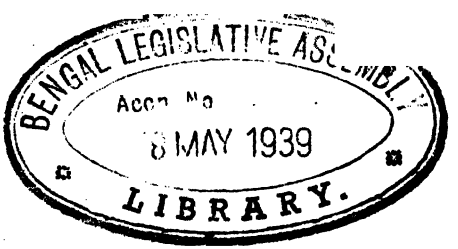
The accounts of other departments include approximately 1,165*l.* for salaries of staff lent to this department.

F. G. A. BUTLER,
Accounting Officer.

Foreign Office,
19 November 1923.

I have examined the above Account in accordance with the provisions of the Exchequer and Audit Departments Act, 1921. I have obtained all the information and explanations that I have required, and I certify, as the result of my audit, that in my opinion the above Account is correct.

MALCOLM G. RAMSAY,
Comptroller and Auditor-General.



APPENDIX IV

The Church of England and the Constitution

It is desirable to include a short reference to the position of the Church of England in the Constitution.

The Crown, in a peculiar sense, stands at the head of the Church of England. The Crown is supreme governor over all persons and in all causes ecclesiastical, possessing a visitatorial and corrective jurisdiction. The Crown is the fountain of justice in ecclesiastical causes, the Privy Council, through its Judicial Committee, acting as court of appeal in these matters.

Until very recently the legislative capacity of the Church of England and its relation to that of the State Legislature was ill-defined or, at least, a matter of controversy. But now by a species of compromise the position has been made comparatively clear by the provisions of the Church of England Assembly (Powers) Act, 1919.[1]

Measures relating to any matter concerning the Church of England (including measures effecting the amendment or repeal of any Act of Parliament, except certain provisions of the Act), when passed by the Church Assembly, are to be sent through a legislative committee of the Assembly to an ecclesiastical committee of Parliament. After any necessary discussion between the two committees, the ecclesiastical committee is to report to Parliament on any measure; and, on a resolution being passed by each House of Parliament directing that the measure shall be presented to His Majesty, it is to be so presented and to have *the force and effect of an Act of Parliament* on the Royal Assent being signified *in the same manner as to Acts of Parliament.*

[1] 9 & 10 Geo. 5, c. 76.

INDEX

PRINTED IN GREAT BRITAIN AT THE UNIVERSITY PRESS, ABERDEEN

A SELECTION FROM
MESSRS. METHUEN'S PUBLICATIONS

This Catalogue contains only a selection of the more important books published by Messrs. Methuen. A complete catalogue of their publications may be obtained on application.

Allcroft (A. Hadrian). DOWNLAND PATHWAYS. With Preface by E. V. LUCAS. Illustrated. *Crown* 8vo. 7s. 6d. *net.*

Archer (D.). CORSICA: THE SCENTED ISLE. Illustrated. *Demy* 8vo. 10s. 6d. *net.*

Armstrong (W. W.). THE ART OF CRICKET. *Third Edition. Cr.* 8vo. 3s. *net.*

Bain (F. W.)—
A DIGIT OF THE MOON: A Hindoo Love Story. THE DESCENT OF THE SUN: A Cycle of Birth. A HEIFER OF THE DAWN. IN THE GREAT GOD'S HAIR. A DRAUGHT OF THE BLUE. AN ESSENCE OF THE DUSK. AN INCARNATION OF THE SNOW. A MINE OF FAULTS. THE ASHES OF A GOD. BUBBLES OF THE FOAM. A SYRUP OF THE BEES. THE LIVERY OF EVE. THE SUBSTANCE OF A DREAM. *All Fcap.* 8vo. 5s. *net.* AN ECHO OF THE SPHERES. *Wide Demy* 8vo. 10s. 6d. *net.*

Baker (C. H. Collins). CROME. Illustrated. *Quarto.* £5, 5s. *net.*

Balfour (Sir Graham). THE LIFE OF ROBERT LOUIS STEVENSON. *Twentieth Edition. In one Volume. Cr.* 8vo. *Buckram,* 7s. 6d. *net.*

Bell (Aubrey F. G.). A PILGRIM IN SPAIN. Illustrated. *Demy* 8vo. 12s. 6d. *net.*

Belloc (H.)—
PARIS, 8s. 6d. *net.* HILLS AND THE SEA, 6s. *net.* ON NOTHING AND KINDRED SUBJECTS, 6s. *net.* ON EVERYTHING, 6s. *net.* ON SOMETHING, 6s. *net.* FIRST AND LAST, 6s. *net.* THIS AND THAT AND THE OTHER, 6s. *net.* ON, 6s. *net.* ON ANYTHING, 6s. *net.* MARIE ANTOINETTE, 18s. *net.* THE PYRENEES. 8s. 6d. *net.*

Butler (Kathleen T.). A HISTORY OF FRENCH LITERATURE. *Two Vols. Each Cr.* 8vo. 10s. 6d. *net.*

Campbell (Olwen Ward). SHELLEY AND THE UNROMANTICS. Illustrated. *Second Edition, Revised. Demy* 8vo. 16s. *net.*

Chandler (Arthur), D.D., late Lord Bishop of Bloemfontein—
ARA CŒLI: An Essay in Mystical Theology, 5s. *net.* FAITH AND EXPERIENCE, 5s. *net.* THE CULT OF THE PASSING MOMENT, 6s. *net.* THE ENGLISH CHURCH AND REUNION, 5s. *net.* SCALA MUNDI, 4s. 6d. *net.*

Chesterton (G. K.)—
THE BALLAD OF THE WHITE HORSE. ALL THINGS CONSIDERED. TREMENDOUS TRIFLES. ALARMS AND DISCURSIONS. A MISCELLANY OF MEN. THE USES OF DIVERSITY. FANCIES VERSUS FADS. *All Fcap.* 8vo. 6s. *net.* CHARLES DICKENS. *Fcap.* 8vo. 3s. 6d. *net.* WINE, WATER, AND SONG. *Fcap.* 8vo. 1s. 6d. *net.*

Clutton-Brock (A.)—
WHAT IS THE KINGDOM OF HEAVEN? *Fifth Edition. Fcap.* 8vo. 5s. *net.* ESSAYS ON ART. *Second Edition. Fcap.* 8vo. 5s. *net.* ESSAYS ON BOOKS. *Third Edition. Fcap.* 8vo. 6s. *net.* MORE ESSAYS ON BOOKS. *Fcap.* 8vo. 6s. *net.* SHAKESPEARE'S HAMLET. *Fcap.* 8vo. 5s. *net.* SHELLEY: THE MAN AND THE POET. *Second Edition, Revised. Fcap.* 8vo. 7s. 6d. *net.*

Conrad (Joseph). THE MIRROR OF THE SEA: Memories and Impressions. *Fourth Edition. Fcap.* 8vo. 6s. *net.* Also Uniform Edition, 3s, 6d. *net.*

Dark (Sidney) and Grey (Rowland). W. S. GILBERT: His Life and Letters. Illustrated. *Second Edition. Demy* 8vo. 15s. *net.*

Dolls' House (The Queen's). THE BOOK OF THE QUEEN'S DOLLS' HOUSE. Vol. I. THE QUEEN'S DOLLS' HOUSE. Edited by A. C. BENSON, C.V.O., and SIR LAWRENCE WEAVER, K.B.E. Vol. II. THE QUEEN'S DOLLS' HOUSE LIBRARY. Edited by E. V. LUCAS. Illustrated. A Limited Edition. *Crown* 4to. £6, 6s. *net.*

EVERYBODY'S BOOK OF THE QUEEN'S DOLLS' HOUSE. Illustrated. *Crown* 4to. 5s. *net.*

Drever (James)—
THE PSYCHOLOGY OF EVERYDAY LIFE. (*Fourth Edition.*) *Cr.* 8vo. 6s. *net.* THE PSYCHOLOGY OF INDUSTRY. *Cr.* 8vo. 5s. *net.*

Dutt (W. A.). A GUIDE TO THE NORFOLK BROADS. Illustrated. *Demy* 8vo. 6s. *net.*

Edwardes (Tickner). THE LORE OF THE HONEY-BEE. *Tenth Edition. Cr.* 8vo. 7s. 6d. *net.*

Einstein (A.). RELATIVITY: THE SPECIAL AND THE GENERAL THEORY. Translated by ROBERT W. LAWSON. *Eighth Edition. Cr.* 8vo. 5s. *net.*

SIDELIGHTS ON RELATIVITY. Two Lectures by ALBERT EINSTEIN. *Cr.* 8vo. 3s. 6d. *net.*

THE MEANING OF RELATIVITY. *Cr.* 8vo. 5s. *net.*
Other Books on the **Einstein Theory.**

SPACE—TIME—MATTER. By HERMANN WEYL. *Demy* 8vo. 18s. *net.*

THE PRINCIPLE OF RELATIVITY. By ALBERT EINSTEIN, H. A. LORENTZ, H. MINKOWSKI, and H. WEYL. With notes by A. SOMMERFELD. *Demy* 8vo, 12s. 6d. *net.*

RELATIVITY AND THE UNIVERSE. By HARRY SCHMIDT. *Second Edition. Cr.* 8vo. 5s. *net.*

THE THEORY OF RELATIVITY. By Prof. ERWIN FREUNDLICH. *Cr. 8vo. 5s. net.*

RELATIVITY FOR ALL. By HERBERT DINGLE. *Third Edition. Fcap. 8vo. 2s. net.*

Evans (Joan). ENGLISH JEWELLERY. *Royal 4to. £2, 12s. 6d. net.*

Fitzgerald (Edward). THE RUBA'IYAT OF OMAR KHAYYAM. An edition illustrated by EDMUND J. SULLIVAN. *Wide Cr. 8vo. 10s. 6d. net.*

Fyleman (Rose)—
FAIRIES AND CHIMNEYS (*Eighteenth Edition*). THE FAIRY GREEN (*Tenth Edition*). THE FAIRY FLUTE (*Eighth Edition*). THE RAINBOW CAT AND OTHER STORIES (*Second Edition*). FORTY GOOD-NIGHT TALES (*Third Edition*). EIGHT LITTLE PLAYS FOR CHILDREN. *All Fcap. 8vo., 3s. 6d. net.* A SMALL CRUSE. *Fcap. 8vo. 4s. 6d. net.* THE ROSE FYLEMAN FAIRY BOOK. Illustrated. *Crown 4to. 10s. 6d. net.*

Geering (Thomas). OUR SUSSEX PARISH. With an Introduction and biographical chapter by ARTHUR BECKETT. Illustrated. *Crown 8vo. 10s. 6d. net.*

Gibbins (H. de B.). INDUSTRY IN ENGLAND: HISTORICAL OUTLINES. With Maps and Plans. *Tenth Edition. Demy 8vo. 12s. 6d. net.*

THE INDUSTRIAL HISTORY OF ENGLAND. With 5 Maps and a Plan. *Twenty-seventh Edition. Cr. 8vo. 5s.*

Gibbon (Edward). THE DECLINE AND FALL OF THE ROMAN EMPIRE. Edited, with Notes, Appendices, and Maps, by J. B. BURY. *Seven Volumes. Demy 8vo.* Illustrated. *Each 12s. 6d. net. Also in Seven Volumes.* Unillustrated. *Cr. 8vo. Each 7s. 6d. net.*

Glover (T. R.)—
THE CONFLICT OF RELIGIONS IN THE EARLY ROMAN EMPIRE, 10s. *6d. net.* POETS AND PURITANS, 10s. *6d. net.* FROM PERICLES TO PHILIP, 10s. *6d. net.* VIRGIL, 10s. *6d. net.*

Graham (Harry). THE WORLD WE LAUGH IN: MORE DEPORTMENTAL DITTIES. Illustrated by "FISH." *Second Edition. Fcap. 8vo. 5s. net.*

Grahame (Kenneth). THE WIND IN THE WILLOWS. *Fourteenth Edition. Cr. 8vo. 7s. 6d. net.*
Also, Illustrated by NANCY BARNHART. *Small 4to. 10s. 6d. net.*

Hadfield (J. A.). PSYCHOLOGY AND MORALS: An Analysis of Character. *Fourth Edition. Cr. 8vo. 6s. net.*

Hall (H. R.). THE ANCIENT HISTORY OF THE NEAR EAST FROM THE EARLIEST TIMES TO THE BATTLE OF SALAMIS. Illustrated. *Sixth Edition, Revised. Demy 8vo. 21s. net.*

Hind (A. M.). A CATALOGUE OF REMBRANDT'S ETCHINGS. *Two vols. Illustrated. Wide Royal 8vo. £1, 15s. net.*

Holdsworth (W. S.). A HISTORY OF ENGLISH LAW. *Seven Volumes. Demy 8vo. Each 25s. net.*

Hoppé (E. O.). IN GIPSY CAMP AND ROYAL PALACE: WANDERINGS IN RUMANIA. With a Preface by the QUEEN OF RUMANIA. Illustrated. *Demy 8vo. 15s. net.*

Hudson (W. H.). A SHEPHERD'S LIFE. Illustrated. *Demy. 8vo. Sixth Edition. 10s. 6d. net. Also Fcap. 8vo. 3s. 6d. net.*

Inge (W. R.). CHRISTIAN MYSTICISM (The Bampton Lectures of 1899). *Fifth Edition. Cr. 8vo. 7s. 6d. net.*

Jenks (E.). AN OUTLINE OF ENGLISH LOCAL GOVERNMENT. *Fifth Edition. Cr. 8vo. 5s. net.*

A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1919. *Third Edition, Revised. Demy 8vo. 12s. 6d. net.*

Jones (M. E. Monckton). ANCIENT EGYPT FROM THE RECORDS. Illustrated. *Crown 8vo. 7s. 6d. net.*

Julian (Lady) of Norwich. REVELATIONS OF DIVINE LOVE. Edited by GRACE WARRACK. *Eighth Edition. Cr. 8vo. 5s. net.*

Keats (John). POEMS. Edited, with Introduction and Notes, by E. DE SÉLINCOURT. With a Frontispiece in Photogravure. *Fourth Edition. Demy 8vo. 12s. 6d. net.*

Kidd (Benjamin)—
THE SCIENCE OF POWER. (*Ninth Edition*). *Cr. 8vo. 7s. 6d. net.* SOCIAL EVOLUTION. *Demy 8vo. 8s. 6d. net.*

Kipling (Rudyard). BARRACK-ROOM BALLADS. *233rd Thousand. Cr. 8vo. Buckram, 7s. 6d. net. Also Fcap. 8vo. Cloth, 6s. net; leather, 7s. 6d. net.*
Also a Service Edition. *Two Volumes. Square Fcap. 8vo. Each 3s. net.*
THE SEVEN SEAS. *172nd Thousand. Cr. 8vo. Buckram, 7s. 6d. net. Also Fcap. 8vo. Cloth, 6s. net; leather, 7s. 6d. net.*
Also a Service Edition. *Two Volumes. Square Fcap. 8vo. Each 3s. net.*
THE FIVE NATIONS. *138th Thousand. Cr. 8vo. Buckram, 7s. 6d. net. Also Fcap. 8vo. Cloth, 6s. net; leather, 7s. 6d. net.*
Also a Service Edition. *Two Volumes. Square Fcap. 8vo. Each 3s. net.*
DEPARTMENTAL DITTIES. *111th Thousand. Cr. 8vo. Buckram, 7s. 6d. net. Also Fcap. 8vo. Cloth, 6s. net; leather, 7s. 6d. net.*
Also a Service Edition. *Two Volumes. Square Fcap. 8vo. Each 3s. net.*
THE YEARS BETWEEN. *95th Thousand. Cr. 8vo. Buckram, 7s. 6d. net. Fcap. 8vo. Cloth, 6s. net; leather, 7s. 6d. net.*
Also a Service Edition. *Two Volumes. Square Fcap. 8vo. Each 3s. net.*
KIPLING ANTHOLOGY—VERSE. *Third Edition. Fcap. 8vo. Cloth, 6s. net. Leather, 7s. 6d. net.*
TWENTY POEMS FROM RUDYARD KIPLING. *397th Thousand. Fcap. 8vo. 1s. net.*

Lamb (Charles and Mary). THE COMPLETE WORKS. Edited by E. V. LUCAS. *A New and Revised Edition in Six Volumes. With Frontispieces. Fcap. 8vo. Each 6s. net.*
The volumes are:—
I. MISCELLANEOUS PROSE. II. ELIA AND THE LAST ESSAYS OF ELIA. III. BOOKS FOR CHILDREN. IV. PLAYS AND POEMS. V. and VI. LETTERS.

Lankester (Sir Ray).—
SCIENCE FROM AN EASY CHAIR (*Fifteenth Edition*). SCIENCE FROM AN EASY CHAIR: *Second Series* (*Third Edition*). DIVERSIONS OF A NATURALIST (*Third Edition*). GREAT AND SMALL THINGS. All Illustrated. *Crown 8vo. 7s. 6d. net.* SECRETS OF EARTH AND SEA (*Second Edition*). Illustrated. *Crown 8vo. 8s. 6d. net.*

Lodge (Sir Oliver). MAN AND THE UNIVERSE. *Ninth Edition. Cr. 8vo. 7s. 6d. net.*

THE SURVIVAL OF MAN: A STUDY IN UNRECOGNIZED HUMAN FACULTY. *Seventh Edition. Cr. 8vo. 7s. 6d. net.*

RAYMOND REVISED. *Cr. 8vo. 6s. net.*

Lorimer (Norma). BY THE WATERS OF EGYPT. Illustrated. *Fourth Edition. Cr. 8vo. 7s. 6d. net.*

Loring (F. H.). ATOMIC THEORIES. *Second Edition. Demy 8vo. 12s. 6d. net.*

THE CHEMICAL ELEMENTS. *Demy 8vo. 8s. 6d. net.*

Lucas (E. V.)—
THE LIFE OF CHARLES LAMB, *2 vols., 21s. net.* EDWIN AUSTIN ABBEY, R.A. *2 vols. £6, 6s. net.* VERMEER OF DELFT, 10s. *6d. net.* A WANDERER IN HOLLAND, 10s *6d. net.* A WANDERER IN LONDON, 10s. *6d. net.* LONDON REVISITED, 10s. *6d. net.* A WANDERER IN PARIS, 10s. *6d. net.* A WANDERER IN FLORENCE, 10s. *6d. net.* A WANDERER IN VENICE, 10s. *6d. net.* A WANDERER AMONG PICTURES. *8s. 6d. net.* THE OPEN ROAD: A Little Book for Wayfarers, *6s. net.* Also an edition illustrated by Claude A. Shepperson, 10s. *6d. net.* Also an edition on India paper, leather, *7s. 6d. net.* THE FRIENDLY TOWN: A Little Book for the Urbane, *6s. net.* FIRESIDE AND SUNSHINE, *6s. net.* CHARACTER AND COMEDY, *6s. net.* THE GENTLEST ART: A Choice of Letters by Entertaining Hands, *6s. 6d. net.* THE SECOND POST, *6s. net.* HER INFINITE VARIETY: A Feminine Portrait Gallery, *6s. net.* GOOD COMPANY: A Rally of Men, *6s. net.* ONE DAY AND ANOTHER, *6s. net.* OLD LAMPS FOR NEW, *6s. net.* LOITERER'S HARVEST, *6s. net.* CLOUD AND SILVER, *6s. net.* A BOSWELL OF BAGHDAD, AND OTHER ESSAYS, *6s. net.* TWIXT EAGLE AND DOVE, *6s. net.* THE PHANTOM JOURNAL, AND OTHER ESSAYS AND DIVERSIONS, *6s. net.* GIVING AND RECEIVING, *6s. net.* LUCK OF THE YEAR, *6s. net.* ENCOUNTERS AND DIVERSIONS, *6s. net.* SPECIALLY SELECTED: A Choice of Essays, *7s. 6d. net.* URBANITIES. Illustrated by G. L. STAMPA, *7s. 6d. net.* YOU KNOW WHAT PEOPLE ARE. *5s. net* THE SAME STAR: A Comedy in Three Acts. *3s. 6d. net.* THE BRITISH SCHOOL: An Anecdotal Guide to the British Painters and Paintings in the National Gallery, *6s. net.* LITTLE BOOKS ON THE GREAT MASTERS, *5s. net each.* ROVING EAST AND ROVING WEST: *5s. net.* See also **Dolls' House (The Queen's).**

Lynd (Robert). THE BLUE LION and Other Essays. *Fcap. 8vo. 6s. net.*

THE PEAL OF BELLS. *Fcap. 8vo. 6s. net.*

Masefield (John). ON THE SPANISH MAIN. *Third Edition. Cr. 8vo. 8s. 6d. net.*

A SAILOR'S GARLAND. *Third Edition. Fcap. 8vo. 6s. net.*

SEA LIFE IN NELSON'S TIME. Illustrated. *Second Edition. Cr. 8vo. 5s. net.*

Meldrum (D. S.). REMBRANDT'S PAINTINGS. *Wide Royal 8vo. £3, 3s. net.*

Methuen (A.). AN ANTHOLOGY OF MODERN VERSE. With Introduction by ROBERT LYND. *Seventeenth Edition. Fcap. 8vo. 6s. net. Thin paper, leather, 7s. 6d. net.*

SHAKESPEARE TO HARDY: AN ANTHOLOGY OF ENGLISH LYRICS. With an Introduction by ROBERT LYND. *Third Edition. Fcap. 8vo, 6s. net. Leather, 7s. 6d. net.*

McDougall (William). AN INTRODUCTION TO SOCIAL PSYCHOLOGY. *Nineteenth Edition. Cr. 8vo. 8s. 6d. net.*

NATIONAL WELFARE AND NATIONAL DECAY. *Cr. 8vo. 6s. net.*

AN OUTLINE OF PSYCHOLOGY. *Demy 8vo. 12s. net.*

BODY AND MIND: A HISTORY AND A DEFENCE OF ANIMISM. *Fifth Edition. Demy 8vo. 12s. 6d. net.*

ETHICS AND SOME MODERN WORLD PROBLEMS. *Crown 8vo. 7s. 6d. net.*

Maeterlinck (Maurice)—
THE BLUE BIRD: A Fairy Play in Six Acts. *6s. net.* Also an edition illustrated by F. Cayley Robinson, 10s. *6d. net.* MARY MAGDALENE: A Play in Three Acts, *5s. net.* DEATH, *3s. 6d. net.* OUR ETERNITY, *6s. net.* THE UNKNOWN GUEST, *6s. net.* POEMS, *5s. net.* THE WRACK OF THE STORM, *6s. net.* THE MIRACLE OF ST. ANTHONY: A Play in One Act, *3s. 6d. net.* THE BURGOMASTER OF STILEMONDE: A Play in Three Acts, *5s. net.* THE BETROTHAL; or, The Blue Bird Chooses, *6s. net.* MOUNTAIN PATHS, *6s. net.* THE STORY OF TYLTYL, *21s. net.* THE GREAT SECRET. *7s. 6d. net.* THE CLOUD THAT LIFTED, and THE POWER OF THE DEAD. *7s. 6d. net.*

Milne (A. A.)—
NOT THAT IT MATTERS. IF I MAY. *Each Fcap. 8vo. 6s. net.* Also Uniform Edition. *Fcap. 8vo. 3s. 6d. net each.* WHEN WE WERE VERY YOUNG. Illustrated by E. H. Shepard. *Crown 8vo. 7s. 6d. net.*

Newman (Tom). HOW TO PLAY BILLIARDS. Illustrated. *Cr. 8vo, 8s. 6d. net.*

BILLIARD DO'S AND DONT'S. *Fcap. 8vo. 2s. 6d. net.*

Oman (Sir Charles). A HISTORY OF THE ART OF WAR IN THE MIDDLE AGES. A.D. 378–1485. *Second Edition, Revised and enlarged. In two volumes.* Illustrated. *Demy* 8vo. 36s. *net.*

Oxenham (John)—
BEES IN AMBER; A Little Book of Thoughtful Verse. *Small Pott* 8vo. *Stiff Boards.* 2s. *net.* ALL'S WELL; A Collection of War Poems. THE KING'S HIGH WAY. THE VISION SPLENDID. THE FIERY CROSS. HIGH ALTARS: The Record of a Visit to the Battlefields of France and Flanders. HEARTS COURAGEOUS. ALL CLEAR! *All Small Pott* 8vo. *Paper,* 1s. 3d. *net; cloth boards,* 2s. *net.* WINDS OF THE DAWN. 2s. *net.*

Perry (W. J.)—
THE ORIGIN OF MAGIC AND RELIGION. THE GROWTH OF CIVILIZATION. With Maps. *Each Crown* 8vo., 6s. *net.* THE CHILDREN OF THE SUN: A STUDY IN THE EARLY HISTORY OF CIVILIZATION. With Maps. *Demy* 8vo. 18s. *net.*

Petrie (Sir Flinders). A HISTORY OF EGYPT. Illustrated. *Six Volumes. Cr.* 8vo. *Each* 9s. *net.*
VOL. I. FROM THE 1ST TO THE XVITH DYNASTY. *Eleventh Edition, Revised.* (12s. *net.*)
VOL. II. THE XVIITH AND XVIIITH DYNASTIES. *Seventh Edition, Revised.*
VOL. III. XIXTH TO XXXTH DYNASTIES. *Second Edition.*
VOL. IV. EGYPT UNDER THE PTOLEMAIC DYNASTY. J. P. MAHAFFY. *Second Edition.*
VOL. V. EGYPT UNDER ROMAN RULE. J. G. MILNE. *Third Edition, Revised.*
VOL. VI. EGYPT IN THE MIDDLE AGES. STANLEY LANE POOLE. *Third Edition.* (10s. *net.*)
SYRIA AND EGYPT, FROM THE TELL EL AMARNA LETTERS. *Cr.* 8vo. 5s. *net.*
EGYPTIAN TALES. Translated from the Papyri. First Series, IVth to XIIth Dynasty. Illustrated. *Third Edition. Cr.* 8vo. 5s. *net.*
EGYPTIAN TALES. Translated from the Papyri. Second Series, XVIIIth to XIXth Dynasty. Illustrated. *Third Edition. Cr.* 8vo. 5s. *net.*

Pollitt (Arthur W.). THE ENJOYMENT OF MUSIC. *Second Edition. Cr.* 8vo. 5s. *net.*

Ponsonby (Arthur). ENGLISH DIARIES. *Second Edition. Demy* 8vo. 21s. *net.*

Power (Eileen). MEDIEVAL PEOPLE. Illustrated. *Crown* 8vo. 6s. *net.*

Price (L. L.). A SHORT HISTORY OF POLITICAL ECONOMY IN ENGLAND FROM ADAM SMITH TO ARNOLD TOYNBEE. *Twelfth Edition. Cr.* 8vo. 5s. *net.*

Selous (Edmund)—
TOMMY SMITH'S ANIMALS. TOMMY SMITH'S OTHER ANIMALS. TOMMY SMITH AT THE ZOO. TOMMY SMITH AGAIN AT THE ZOO. *Each* 2s. 9d. TOMMY SMITH'S BIRDS, 2s. 6d. JACK'S INSECTS, 3s. 6d. JACK'S OTHER INSECTS, 3s. 6d. All Illustrated.

Smith (Adam). THE WEALTH OF NATIONS. Edited by EDWIN CANNAN. *Two Volumes. Third Edition. Demy* 8vo. £1, 5s. *net.*

Smith (C. Fox).
SAILOR TOWN DAYS. SEA SONGS AND BALLADS. A BOOK OF FAMOUS SHIPS. SHIP ALLEY: MORE SAILOR TOWN DAYS. All Illustrated. *Cr.* 8vo. 6s. *net. each.* THE RETURN OF "THE CUTTY SARK." Illustrated. *Crown* 8vo. 2s. 6d. *net.*

Sommerfeld (Arnold). ATOMIC STRUCTURE AND SPECTRAL LINES. *Demy* 8vo. 32s. *net.*

Stevenson (R. L.). THE LETTERS OF ROBERT LOUIS STEVENSON. Edited by Sir SIDNEY COLVIN. *A New Re-arranged Edition in four volumes. Fourth Edition. Fcap.* 8vo. *Each* 6s. *net.*

Surtees (R. S.)—
HANDLEY CROSS, 7s. 6d. *net.* MR. SPONGE'S SPORTING TOUR, 7s. 6d. *net.* ASK MAMMA: or, The Richest Commoner in England, 7s. 6d. *net.* JORROCKS'S JAUNTS AND JOLLITIES, 6s. *net.* MR. FACEY ROMFORD'S HOUNDS, 7s. 6d. *net.* HAWBUCK GRANGE; or, The Sporting Adventures of Thomas Scott, Esq., 6s. *net.* PLAIN OR RINGLETS? 7s. 6d. *net.* HILLINGDON HALL, 7s. 6d. *net.*

Tatchell (Frank). THE HAPPY TRAVELLER: A BOOK FOR POOR MEN. *Fourth Edition. Cr.* 8vo. 7s. 6d. *net.*

Thomson (J. Arthur). WHAT IS MAN? *Second Edition. Cr.* 8vo. 6s. 6d. *net.*
SCIENCE AND RELIGION. *Crown* 8vo. 7s. 6d. *net.*

Tilden (W. T.)—
THE ART OF LAWN TENNIS (*Sixth Edition*). SINGLES AND DOUBLES (*Second Edition*). *Each Illustrated. Crown* 8vo. 6s. *net.* THE COMMON SENSE OF LAWN TENNIS. Illustrated. *Crown* 8vo. 5s. *net.*

Tileston (Mary W.). DAILY STRENGTH FOR DAILY NEEDS. *Twenty-ninth Edition. Medium* 16mo. 3s. 6d. *net.*

Underhill (Evelyn). MYSTICISM. A Study in the Nature and Development of Man's Spiritual Consciousness. *Tenth Edition. Demy* 8vo. 15s. *net.*
THE LIFE OF THE SPIRIT AND THE LIFE OF TO-DAY. *Fifth Edition. Cr.* 8vo. 7s. 6d. *net.*

Vardon (Harry). HOW TO PLAY GOLF. Illustrated. *Eighteenth Edition. Cr.* 8vo. 5s. *net.*

Waterhouse (Elizabeth). A LITTLE BOOK OF LIFE AND DEATH. *Twenty-second Edition. Small Pott* 8vo. 2s. 6d. *net.*

Wegener (A.). THE ORIGIN OF CONTINENTS AND OCEANS. *Demy* 8vo. 10s. 6d. *net.*

Wells (J.). A SHORT HISTORY OF ROME. *Nineteenth Edition.* With 3 Maps. *Cr.* 8vo. 5s.

Wilde (Oscar). THE WORKS OF OSCAR WILDE. *Fcap.* 8vo. *Each* 6s. 6d. *net.*

I. LORD ARTHUR SAVILE'S CRIME AND THE PORTRAIT OF MR. W. H. II. THE DUCHESS OF PADUA. III. POEMS. IV. LADY WINDERMERE'S FAN. V. A WOMAN OF NO IMPORTANCE. VI. AN IDEAL HUSBAND. VII. THE IMPORTANCE OF BEING EARNEST. VIII. A HOUSE OF POMEGRANATES. IX. INTENTIONS. X. DE PROFUNDIS AND PRISON LETTERS. XI. ESSAYS. XII. SALOMÉ, A FLORENTINE TRAGEDY, and LA SAINTE COURTISANE. XIII. A CRITIC IN PALL MALL. XIV. SELECTED PROSE OF OSCAR WILDE. XV. ART AND DECORATION. XVI. FOR LOVE OF THE KING: A Burmese Masque (*5s. net.*).

Yeats (W. B.). A BOOK OF IRISH VERSE. *Fourth Edition. Cr. 8vo. 7s. net.*

PART II.—A SELECTION OF SERIES

The Antiquary's Books

Demy 8vo. **10s. 6d.** *net each volume. With Numerous Illustrations*

ANCIENT PAINTED GLASS IN ENGLAND. ARCHÆOLOGY AND FALSE ANTIQUITIES. THE BELLS OF ENGLAND. THE BRASSES OF ENGLAND. THE CASTLES AND WALLED TOWNS OF ENGLAND. CHURCHWARDENS' ACCOUNTS. THE DOMESDAY INQUEST. ENGLISH CHURCH FURNITURE. ENGLISH MONASTIC LIFE. ENGLISH SEALS. FOLK-LORE AS AN HISTORICAL SCIENCE. THE GUILDS AND COMPANIES OF LONDON. THE HERMITS AND ANCHORITES OF ENGLAND. THE MANOR AND MANORIAL RECORDS. THE MEDIÆVAL HOSPITALS OF ENGLAND. OLD ENGLISH INSTRUMENTS OF MUSIC. OLD ENGLISH LIBRARIES. OLD SERVICE BOOKS OF THE ENGLISH CHURCH. PARISH LIFE IN MEDIÆVAL ENGLAND. THE PARISH REGISTERS OF ENGLAND. REMAINS OF THE PREHISTORIC AGE IN ENGLAND. THE ROMAN ERA IN BRITAIN. ROMANO-BRITISH BUILDINGS AND EARTHWORKS. THE ROYAL FORESTS OF ENGLAND. THE SCHOOLS OF MEDIÆVAL ENGLAND. SHRINES OF BRITISH SAINTS.

The Arden Shakespeare

General Editor, R. H. CASE

Wide Demy 8vo. **6s.** *net each volume*

An edition of Shakespeare in Single Plays; each edited with a full Introduction, Textual Notes, and a Commentary at the foot of the page.

The Arden Shakespeare has now been completed by the publication of MUCH ADO ABOUT NOTHING. Edited by GRACE R. TRENERY.

Classics of Art

Edited by DR. J. H. W. LAING

With numerous Illustrations. Wide Royal 8vo.

THE ART OF THE GREEKS, 21s. *net.* THE ART OF THE ROMANS, 16s. *net.* CHARDIN, 15s. *net.* DONATELLO, 16s. *net.* FLORENTINE SCULPTORS OF THE RENAISSANCE, 21s. *net.* GEORGE ROMNEY, 15s. *net.* GHIRLANDAIO, 15s. *net.* LAWRENCE, 25s. *net.* MICHELANGELO, 21s. *net.* RAPHAEL, 15s. *net.* REMBRANDT'S PAINTINGS, 63s. *net.* RUBENS, 30s. *net.* TINTORETTO, 16s. *net.* TITIAN, 16s. *net.* TURNER'S SKETCHES AND DRAWINGS, 15s. *net.* VELASQUEZ, 15s. *net.*

The "Complete" Series

Fully Illustrated. Demy 8vo

THE COMPLETE AIRMAN, 16s. *net.* THE COMPLETE AMATEUR BOXER, 10s. 6d. *net.* THE COMPLETE ATHLETIC TRAINER, 10s. 6d. *net.* THE COMPLETE BILLIARD PLAYER, 10s. 6d. *net.* THE COMPLETE COOK, 10s. 6d. *net.* THE COMPLETE FOXHUNTER, 16s. *net.* THE COMPLETE GOLFER, 12s. 6d. *net.* THE COMPLETE HOCKEY PLAYER, 10s. 6d. *net.* THE COMPLETE HORSEMAN, 15s. *net.* THE COMPLETE JUJITSUAN. (*Cr. 8vo.*) 5s. *net.* THE COMPLETE LAWN TENNIS PLAYER, 12s. 6d. *net.* THE COMPLETE MOTORIST, 10s. 6d. *net.* THE COMPLETE MOUNTAINEER, 18s. *net.* THE COMPLETE OARSMAN, 12s. 6d. *net.* THE COMPLETE PHOTOGRAPHER, 12s. 6d. *net.* THE COMPLETE RUGBY FOOTBALLER, ON THE NEW ZEALAND SYSTEM, 12s. 6d. *net.* THE COMPLETE SHOT, 16s. *net.* THE COMPLETE SWIMMER, 10s. 6d. *net.* THE COMPLETE YACHTSMAN, 15s. *net.*

The Connoisseur's Library

With numerous Illustrations. Wide Royal 8vo. £1, 11s. 6d. *net each volume*

ENGLISH COLOURED BOOKS. ETCHINGS. EUROPEAN ENAMELS. FINE BOOKS. GLASS. GOLDSMITHS' AND SILVERSMITHS' WORK. ILLUMINATED MANUSCRIPTS. IVORIES. JEWELLERY. MEZZOTINTS. MINIATURES. PORCELAIN. SEALS. WOOD SCULPTURE.

Health Series

Fcap. 8vo. 2s. 6d. net each volume

THE BABY. THE CARE OF THE BODY. THE CARE OF THE TEETH. THE EYES OF OUR CHILDREN. HEALTH FOR THE MIDDLE-AGED. THE HEALTH OF A WOMAN. THE HEALTH OF THE SKIN. HOW TO LIVE LONG. THE PREVENTION OF THE COMMON COLD. STAYING THE PLAGUE. THROAT AND EAR TROUBLES. TUBERCULOSIS. THE HEALTH OF THE CHILD, *2s. net.*

The Library of Devotion

Handy Editions of the great Devotional Books, well edited
With Introductions and (where necessary) Notes
Small Pott 8vo, cloth, 3s. net and 3s. 6d. net

Little Books on Art

With many Illustrations. Demy 16mo. 5s. net each volume

Each volume consists of about 200 pages, and contains from 30 to 40 Illustrations, including a Frontispiece in Photogravure

ALBRECHT DÜRER. THE ARTS OF JAPAN. E-JONES. CELLINI. CHRIST IN ART. CLAUDE. CONSTABLE. COROT. EARLY ENGLISH WATER-COLOUR. ENAMELS. FREDERIC LEIGHTON. GEORGE ROMNEY. GREEK ART. GREUZE AND BOUCHER. HOLBEIN. ILLUMINATED MANUSCRIPTS. JEWELLERY. JOHN HOPPNER. Sir JOSHUA REYNOLDS. MILLET. MINIATURES. OUR LADY IN ART. RAPHAEL. RODIN. TURNER. VANDYCK. WATTS.

The Little Guides

With many Illustrations by E. H. NEW and other artists, and from photographs, Maps and Plans

Small Pott 8vo. 4s. net to 7s. 6d. net each

Guides to the English and Welsh Counties, and some well-known districts.

The main features of these Guides are (1) a handy and charming form; (2) illustrations from photographs and by well-known artists; (3) good plans and maps; (4) an adequate but compact presentation of everything that is interesting in the natural features, history, archæology, and architecture of the town or district treated.

Plays

Fcap. 8vo. 3s. 6d. net each

MILESTONES. Arnold Bennett and Edward Knoblock. *Eleventh Edition.*
IDEAL HUSBAND, AN. Oscar Wilde. *Acting Edition.*
KISMET. Edward Knoblock. *Fourth Edition.*
WARE CASE, THE. George Pleydell.
THE SAME STAR. E. V. Lucas.
THE GREAT ADVENTURE. Arnold Bennett. *Fifth Edition.*
GENERAL POST. J. E. Harold Terry. *Second Edition.*
THE HONEYMOON. Arnold Bennett. *Third Edition.*

Sport Series

Mostly illustrated. Fcap. 8vo

ALL ABOUT FLYING, 3s. *net.* ALPINE SKI-ING AT ALL HEIGHTS AND SEASONS, 5s. *net.* SKI-ING FOR BEGINNERS, 5s. *net.* GOLF DO'S AND DONT'S, 2s. *net.* QUICK CUTS TO GOOD GOLF, 2s. *net.* INSPIRED GOLF, 2s. 6d. *net.* DRIVING, APPROACHING, PUTTING, 2s. *net.* GOLF CLUBS AND HOW TO USE THEM, 2s. *net.* THE SECRET OF GOLF FOR OCCASIONAL PLAYERS, 2s. *net.* THE GOLFING SWING, 2s. 6d. *net.* GOLF RULES AND DECISIONS. 3s. 6d. *net.* THE AUTOBIOGRAPHY OF A CADDY-BAG, 2s. 6d. *net.* LAWN TENNIS, 2s. 6d. *net.* LAWN TENNIS DO'S AND DONT'S, 2s. 6d. *net.* LAWN TENNIS FOR YOUNG PLAYERS, 2s. 6d. *net.* LAWN TENNIS FOR CLUB PLAYERS, 2s. 6d. *net.* LAWN TENNIS FOR MATCH PLAYERS, 2s. 6d. *net.* LAWN TENNIS FOR PUBLIC COURTS PLAYERS, 2s. 6d. *net.* THE TECHNIQUE OF LAWN TENNIS, 2s. 6d. *net.* THE LAWN TENNIS UMPIRE AND REFEREE, 2s. 6d. *net.* HOCKEY, 4s. *net.* HOW TO SWIM, 2s. *net.* PUNTING, 3s. 6d. *net.* SKATING, 3s. *net.* WRESTLING, 2s. *net.* MOTOR DO'S AND DONT'S, 2s. 6d. *net.* MAH JONG DO'S AND DONT'S, 2s. *net.* AUCTION BRIDGE DO'S AND DONT'S. 3s. *net.* BILLIARD DO'S AND DONT'S. 2s. 6d. *net.*

Methuen's Half-Crown Library

Crown 8vo.

Cheap Editions of Popular Books

Methuen's Two-Shilling Library

Fcap. 8vo.

Write for Complete Lists

PART III.—A SELECTION OF WORKS OF FICTION

Bennett (Arnold)—
CLAYHANGER, 8s. *net.* HILDA LESSWAYS. 8s. 6d. *net.* THESE TWAIN. THE CARD. THE REGENT: A Five Towns Story of Adventure in London. THE PRICE OF LOVE. BURIED ALIVE. A MAN FROM THE NORTH. WHOM GOD HATH JOINED. A GREAT MAN: A Frolic. MR. PROHACK. *All* 7s. 6d. *net.* THE MATADOR OF THE FIVE TOWNS, 6s. *net.*

Birmingham (George A.)—
SPANISH GOLD. THE SEARCH PARTY. THE BAD TIMES. UP, THE REBELS. THE LOST LAWYER. THE GREAT-GRANDMOTHER. FOUND MONEY. *All* 7s. 6d. *net.* INISHEENY, 8s. 6d. *net.*

Brandon (John G.)—THE BIG HEART. *Third Edition. Cr. 8vo.* 3s. 6d. *net.*

Burroughs (Edgar Rice)—
THE RETURN OF TARZAN, 6s. *net.* THE BEASTS OF TARZAN, 6s. *net.* THE SON OF TARZAN, 6s. *net.* JUNGLE TALES OF TARZAN, 6s. *net.* TARZAN AND THE JEWELS OF OPAR, 6s. *net.* TARZAN THE UNTAMED, 7s. 6d. *net.* TARZAN AND THE GOLDEN LION, 3s. 6d. *net.* A PRINCESS OF MARS, 6s. *net.* THE GODS OF MARS, 6s. *net.* THE WARLORD OF MARS, 6s. *net.* THUVIA, MAID OF MARS, 6s. *net.* TARZAN THE TERRIBLE, 2s. 6d. *net.* THE MUCKER, 6s. *net.* THE MAN WITHOUT A SOUL, 6s. *net.* THE CHESSMEN OF MARS, 7s. 6d. *net.* AT THE EARTH'S CORE, 7s. 6d. *net.* PELLUCIDAR, 7s. 6d. *net.* THE GIRL FROM HOLLYWOOD, 7s. 6d. *net.*

Conrad (Joseph)—
A SET OF SIX, 7s. 6d. *net.* VICTORY: AN Island Tale. THE SECRET AGENT: A Simple Tale. UNDER WESTERN EYES. CHANCE. *All* 9s. *net.* Also Uniform Edition. *Fcap. 8vo.* 3s. 6d. *net each.*

Corelli (Marie)—
A ROMANCE OF TWO WORLDS, 7s. 6d. *net.* VENDETTA: or, The Story of One Forgotten, 7s. 6d. *net.* THELMA: A Norwegian Princess, 7s. 6d. *net.* ARDATH: The Story of a Dead Self, 7s. 6d. *net.* THE SOUL OF LILITH, 7s. 6d. *net.* WORMWOOD: A Drama of Paris, 7s. 6d. *net.* BARABBAS: A Dream of the World's Tragedy, 7s. 6d. *net.* THE SORROWS OF SATAN, 7s. 6d. *net.* THE MASTER-CHRISTIAN, 7s. 6d. *net.* TEMPORAL POWER: A Study in Supremacy, 6s. *net.* GOD'S GOOD MAN: A Simple Love Story, 7s. 6d. *net.* HOLY ORDERS: The Tragedy of a Quiet Life, 8s. 6d. *net.* THE MIGHTY ATOM, 7s. 6d. *net.* BOY: A Sketch, 7s. 6d. *net.* CAMEOS, 6s. *net.* THE LIFE EVERLASTING. 8s. 6d. *net.* THE LOVE OF LONG AGO, AND OTHER STORIES, 7s. 6d. *net.* INNOCENT, 7s. 6d. *net.* THE SECRET POWER: A Romance of the Time, 6s. *net.* LOVE—AND THE PHILOSOPHER: A Study in Sentiment, 6s. *net.* Also Uniform Edition. *Crown 8vo.* 3s. 6d. *net each.*

Hichens (Robert)—
FELIX: Three Years in a Life, *7s. 6d. net.* THE WOMAN WITH THE FAN, *7s. 6d. net.* THE GARDEN OF ALLAH, *8s. 6d. net.* THE CALL OF THE BLOOD, *8s. 6d. net.* THE DWELLER ON THE THRESHOLD, *7s. 6d. net.* THE WAY OF AMBITION, *7s. 6d. net.* IN THE WILDERNESS, *7s. 6d. net.* AFTER THE VERDICT, *7s. 6d. net.*

Hope (Anthony)—
A CHANGE OF AIR. A MAN OF MARK. SIMON DALE. THE KING'S MIRROR. THE DOLLY DIALOGUES. MRS. MAXON PROTESTS. A YOUNG MAN'S YEAR. BEAUMAROY HOME FROM THE WARS. *All 7s. 6d. net.*

Jacobs (W. W.)—
MANY CARGOES, *5s. net.* SEA URCHINS, *5s. net* and *3s. 6d. net.* A MASTER OF CRAFT, *6s. net.* LIGHT FREIGHTS, *6s. net.* THE SKIPPER'S WOOING, *5s. net.* AT SUNWICH PORT, *5s. net.* DIALSTONE LANE, *5s. net.* ODD CRAFT, *5s. net.* THE LADY OF THE BARGE, *5s. net.* SALTHAVEN, *6s. net.* SAILORS' KNOTS, *5s. net.* SHORT CRUISES, *6s. net.*

Knox (R. A.)—
MEMORIES OF THE FUTURE. *7s. 6d. net.* SANCTIONS: A FRIVOLITY. *7s. 6d. net.*

London (Jack)—WHITE FANG. *Nineteenth Edition. Cr. 8vo. 7s. 6d. net.*

Lucas (E. V.)—
LISTENER'S LURE: An Oblique Narration, *6s. net.* OVER BEMERTON'S: An Easy-going Chronicle, *6s. net.* MR. INGLESIDE, *6s. net.* LONDON LAVENDER, *6s. net.* LANDMARKS, *6s. net.* THE VERMILION BOX, *6s. net.* VERENA IN THE MIDST, *8s. 6d. net.* ROSE AND ROSE, *6s. net.* GENEVRA'S MONEY, *7s. 6d. net.* ADVISORY BEN, *7s. 6d. net.*

McKenna (Stephen)—
SONIA: Between Two Worlds, *8s. net.* NINETY-SIX HOURS' LEAVE, *7s. 6d. net.* THE SIXTH SENSE, *6s. net.* MIDAS & SON, *8s. net.*

Malet (Lucas)—
THE HISTORY OF SIR RICHARD CALMADY: A Romance. *10s. net.* THE CARISSIMA. THE GATELESS BARRIER. DEADHAM HARD. COLONEL ENDERBY'S WIFE, *All 7s. 6d. net.* THE WAGES OF SIN. *8s. net.*

Mason (A. E. W.). CLEMENTINA. Illustrated. *Ninth Edition. 7s. 6d. net.*

Milne (A. A.)—
THE DAY'S PLAY. THE HOLIDAY ROUND. ONCE A WEEK. *All 7s. 6d. net.* THE SUNNY SIDE. *6s. net.* Also Uniform Edition. *Fcap. 8vo. 3s. 6d. net each.* THE RED HOUSE MYSTERY. *6s. net.*

Oxenham (John)—
THE QUEST OF THE GOLDEN ROSE. MARY ALL-ALONE. *7s. 6d. net.*

Parker (Gilbert)—
The TRANSLATION OF A SAVAGE. WHEN VALMOND CAME TO PONTIAC: The Story of a Lost Napoleon. AN ADVENTURER OF THE NORTH: The Last Adventures of "Pretty Pierre." THE SEATS OF THE MIGHTY. THE BATTLE OF THE STRONG: A Romance of Two Kingdoms. THE TRAIL OF THE SWORD. NORTHERN LIGHTS. *All 7s. 6d. net.* THE JUDGMENT HOUSE. *3s. 6d. net.*

Phillpotts (Eden)—
CHILDREN OF THE MIST. THE RIVER. THE HUMAN BOY AND THE WAR. *All 7s. 6d. net.*

Richmond (Grace S.)—
FOURSQUARE. A COURT OF INQUIRY. RUFUS. *All 7s. 6d. net.*

Rohmer (Sax)—
THE GOLDEN SCORPION. *7s. 6d. net.* THE DEVIL DOCTOR. THE MYSTERY OF DR. FU-MANCHU. THE YELLOW CLAW. *All 3s. 6d. net.*

Swinnerton (F.). SHOPS AND HOUSES. SEPTEMBER. THE HAPPY FAMILY. ON THE STAIRCASE. COQUETTE. THE CHASTE WIFE. THE THREE LOVERS. *All 7s. 6d. net.* THE MERRY HEART. THE CASEMENT. THE YOUNG IDEA. *All 6s. net.*

Wells (H. G.). BEALBY. *Fourth Edition. Cr. 8vo. 7s. 6d. net.*

Williamson (Mrs. C. N.). NAME THE WOMAN. *Crown 8vo. 7s. 6d. net.*

Williamson (C. N. and A. M.)—
THE LIGHTNING CONDUCTOR: The Strange Adventures of a Motor-Car. LADY BETTY ACROSS THE WATER. IT HAPPENED IN EGYPT. THE SHOP GIRL. MY FRIEND THE CHAUFFEUR. SET IN SILVER. THE GREAT PEARL SECRET. *All 7s. 6d. net.* CRUCIFIX CORNER. *6s. net.*

Wodehouse (P. G.). BILL THE CONQUEROR. *Crown 8vo. 7s. 6d. net.*

Methuen's Half-Crown Novels

Crown 8vo.

Cheap Editions of many of the most Popular Novels of the day

Methuen's Two-Shilling Novels

Fcap. 8vo.

Write for Complete Lists